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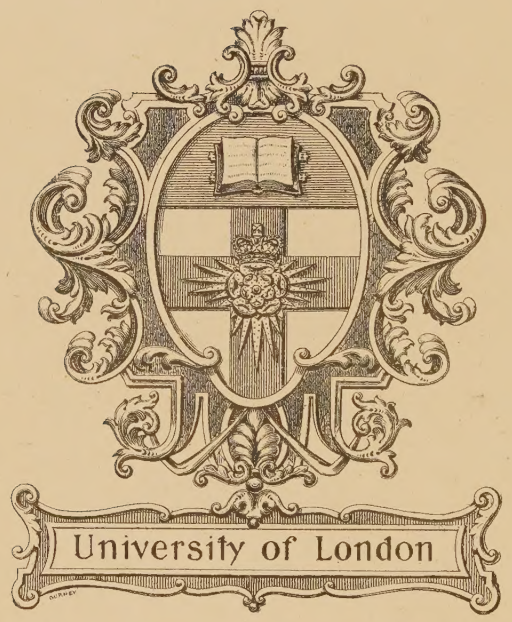

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CASES

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OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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Workman *v.* Great Northern Railway Company	32 L. J. (Q.B.) 279	512
Wright *v.* Atkyns	Coop. G. 11	662
——— *v.* Callender	2 D. M. & G. 652	153
——— *v.* Stanfield	27 Beav. 8	194
Wyatt *v.* Barwell	19 Ves. 435	195
Wynne *v.* Hawkins	1 Bro. C. C. 179	97
Wyth *v.* Blackman	1 Ves. Sen. 197	134

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

BURGOINE *v.* TAYLOR.

C. A.
1878
FRY, J.
March 23.
C. A.
April 3.

[1877 B. 321.]

Practice—Judgment in Default of Appearance at Trial—Application to set aside Judgment—Negligence of Solicitor—Rules of Court, 1875, *Order* XXXVI., *r.* 20.

A Defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one Judge of the Chancery Division to another, and had therefore only watched the list before the former Judge :—

Held, by *Fry*, J., that the solicitor had been guilty of gross negligence, and that the judgment which had been given for the Plaintiff could not be set aside under Rules of Court, 1875, Order XXXVI., r. 20 :

Held, on appeal, that the judgment must be set aside on payment of the costs of the day.

Statement.

THIS action was in the list for trial before Mr. Justice *Fry* on the 18th of March, 1877. The Defendant did not appear, and

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judgment was given for the Plaintiff. The action had been originally set down before Vice-Chancellor *Malins*, and it was, by an order of the Lord Chancellor, dated the 21st of February, 1878, transferred (with other actions) to Mr. Justice *Fry* for trial.

On the 20th of March the Defendant, by special leave of the Court, gave notice of motion that the judgment might be set aside and the action restored to the paper for trial on such terms as to the Court might seem fit. In support of the motion two affidavits were filed, one made by the Defendant's solicitor, the other by his clerk. The solicitor said: "The order for such transfer was unknown and unnoticed by me, the duty of watching the lists of causes for trial having been intrusted to the clerk in my office, who should attend to such matters, and the order for such transfer being unobserved by the clerk, the list of causes in Vice-Chancellor *Malins'* Court was alone watched, and this cause appears therein to stand fifty-seven below the causes for trial on the 18th inst. No steps were taken for instructing counsel to appear for the Defendant; therefore this cause was tried yesterday without appearance on the part of the Defendant, his solicitors having no knowledge that it stood for trial in the Court of Mr. Justice *Fry*. The Defendant has a good defence on the merits of the case, and is prepared to substantiate such defence by evidence in Court." The clerk said: "The duty of watching the list of causes for trial having been intrusted to me at the commencement of January last, on one or two occasions I searched the book containing the list of causes to be tried before Vice-Chancellor *Malins* kept at the Registrar's office, but, since the 12th of January last, when the said list of causes appeared in the *Weekly Notes* of that date, I have every day carefully watched the daily list of causes to be tried before Vice-Chancellor *Malins* as it appeared in the *Times* newspaper, and compared the same with the said list of causes as contained in the *Weekly Notes*, and on the 18th of March inst. this cause appears about fifty below the causes for trial on that day. The order for the transfer of this cause was entirely unknown and unnoticed by me."

The motion was heard before Mr. Justice *Fry* on the 23rd of March, 1878.

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Argument.

Dauney, for the Defendant:—

The Court has power to grant the application under Rules of Court, 1875, Order xxxvi., rule 20, and the evidence shews sufficient ground for granting it. *Wright* v. *Clifford*, before your Lordship on the 11th of February, 1878, was a very similar case. Of course the Defendant will have to pay the costs of the trial and of this motion, but that is a sufficient penalty to impose on him.

North, Q.C., and *Baker*, for the Plaintiff:—

A party has a right to retain every advantage which the rules give him: *International Financial Society* v. *City of Moscow Gas Company* (1); *Rhodes* v. *Jenkins* (2). *Wright* v. *Clifford* was a different case.

[FRY, J.:—There had been a sudden run on the paper.]

Cockle v. *Joyce* (3) is also distinguishable.

[FRY, J.:—In that case the Plaintiff's leading counsel had been detained by a railway accident, and the junior counsel, though he was present in Court, was so unwell that he was unable to address the Court.]

Watt v. *Barnett* (4) shews that the applicant ought to satisfy the Court that he has a good defence on the merits.

[FRY, J.:—I always feel great hesitation in making a man swear to merits; it imposes a great burden on his conscience.]

Dauney, in reply:—

There will be no hardship on the Plaintiff, if the application is granted; he will be in the same position as if the action had not been tried. On the other hand, if the application is not granted, the hardship to the Defendant will be very great.

[FRY, J.:—He will have a remedy against his solicitor for negligence.]

Is the mere omission of a clerk to think of the possibility of a transfer a sufficient reason for inflicting such a penalty on the solicitor? The cases cited with regard to applications for extending the time for bringing an appeal depend on a different

(1) 7 Ch. D. 241, 247.
(2) Ibid. 711.
(3) 7 Ch. D. 56.
(4) 3 Q. B. D. 363.

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principle. There the party had the rules before him, and chose to put his own construction upon them; here the solicitor and his clerk were ignorant of the fact of the transfer.

Judgment, Fry, J.

FRY, J.:—

I am asked to set aside this judgment on the simple ground that the Defendant's solicitor and his clerk were so negligent that they did not know of the order for transfer, or that the action had come into the list for trial, and I think that I ought not, upon this simple ground of gross negligence, to grant the application. It is very important that it should be understood that solicitors are bound to use due diligence. The fact that the transfer had been made ought to have been known to the Defendant's solicitor or to his clerk. The order for transfer was published in the *Weekly Notes*, which it is clear from the affidavits that the Defendant's solicitor took in. He had ample means of knowing of the transfer. If I were to accede to the application, the result would be that a solicitor who asked to have a judgment, obtained against his client in default of appearance at the trial, set aside, would only have to shew that he himself had been guilty of gross negligence. I do not think it right to encourage negligence to that extent, and on that simple ground I refuse the motion with costs.

C. A.

The Defendant appealed. The appeal was heard on the 3rd of April.

Argument.

Cookson, Q.C., and *Dauney*, having opened the appeal, were stopped by the Court.

North, Q.C., and *Baker*, for the Plaintiff, relied on the same grounds as in the Court below.

Cookson, in reply.

Judgment, C. A Jessel, M.R.

JESSEL, M.R.:—

We think that the order asked for by the Defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of

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which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the Court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the Appellant was in default, he must pay the costs of the application to the Court below, but no costs of the appeal.

Judgment, C. A. Jessel, M.R.

COTTON and THESIGER, L.JJ., concurred.

Cotton and Thesiger, L.JJ.

Solicitors: *Parson & Lee; Tippetts, Son, & Tickle.*

In re MICHELL'S TRUSTS.

C. A. 1878 *April* 10.

Covenant to settle future Property of Wife—Marriage Settlement.

A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnization of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:—

Held, that it was not within the covenant.

A petitioner applied for payment out of Court of the whole of a fund, his title to one moiety of which was not disputed. The Court below ordered payment to him of one moiety only:—

Held, that an appeal from this order was not an appeal from the refusal of an application, and that the time for appealing did not begin to run till the order was drawn up.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1). By a settlement dated the 18th of February, 1825, a sum of

(1) 6 Ch. D. 618.

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£2500 £3 10*s.* per Cent. Bank Annuities was settled in trust for *Henry Dorset* for life, and after his death, for his wife *Catherine* for life, and after the decease of the survivor, in trust for the children of *Henry Dorset* by his said wife, and if none, then for the executors, administrators, or assigns of *William Michell.*

William Michell, by will dated the 25th of March, 1825, devised an estate at *Ashburnham* to *Henry Dorset* and his wife during their joint lives and the life of the survivor, and after the decease of the survivor, to and among the children of *Henry Dorset* living at the decease of such survivor, as tenants in common; but if there should be no child of *Henry Dorset* living at the decease of the survivor of *Henry Dorset* and wife, then the testator directed the property to fall into the residue of his real and personal estate. He gave the residue of his real and personal estate to trustees upon trust to sell, to invest the proceeds, pay the income to his wife *Sally Michell* for life, and after her death, as to one-third of the fund, in trust for testator's brother *John Henry Michell,* if then living, but if not, then in trust for all the children of *J. H. Michell* then living, as tenants in common. By a codicil the testator explained the gift to the children of *H. Dorset* to mean only his children by his said wife *Catherine.*

William Michell died on the 4th of April, 1830, and *Catherine Dorset* died on the 22nd of May, 1840, without issue, so that on her decease the reversion expectant on the life estate of *H. Dorset* in the £2500 stock and the *Ashburnham* estate became part of the residuary estate of *W. Michell.*

J. H. Michell had one child only, *Margaret Henrietta.* By a settlement dated the 2nd of July, 1842, made on her marriage with *F. J. S. Hepburn,* reciting an agreement for the settlement of certain specified funds upon the trusts thereinafter declared, and an agreement "that the said *F. J. S. Hepburn* should enter into the covenant for settling upon the same trusts any future property to which the said *M. H. Michell* may become entitled after the solemnization of the said intended marriage hereinafter contained," certain funds were settled in trust for the wife for life, then for the husband for life, then upon trusts for the children of the marriage, and in default of children, as to one moiety upon trust for the persons who at the death of Mrs. *Hepburn* would have become

entitled thereto as her next of kin if she had died possessed thereof intestate and without having been married, and as to the other moiety thereof, upon such trusts as Mrs. *Hepburn* should by will appoint, and in default of appointment, upon the trusts therein mentioned. And by the settlement Mr. *Hepburn* covenanted with the trustees "that in case at any time during the joint lives of the said *F. J. S. Hepburn* and *M. H. Michell* any future portion, or real or personal estate whatsoever, exceeding at one time in value £300, shall come to or devolve upon the said *Margaret H. Michell*, or upon the said *F. J. S. Hepburn* in her right, by or under the will of the said *J. H. Michell*, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the said *F. J. S. Hepburn*, and all other necessary parties, will from time to time effectually settle or concur with the said *Margaret H. Michell* in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, upon the same trusts, and with and subject to the same powers and provisions as are hereinbefore declared and contained concerning the said trust moneys and securities hereby settled, or as near thereto as by the deaths of parties and other contingencies shall be then subsisting and capable of taking effect, and as if the same future property were included and settled in and by this indenture, and being real estate were directed to be converted into personal estate."

Mrs. *Hepburn*, by will dated the 10th of April, 1843, appointed that if she died in the lifetime of her husband, and no child became entitled under the trusts of her settlement, then after the decease of the survivor of her father and mother one moiety of the settled funds, including funds brought in under the covenant for settlement of future property, should belong to her husband absolutely.

J. H. Michell died on the 10th of March, 1844, and his wife on the 21st of September, 1849.

Sally Michell, the widow of *William Michell*, died on the 15th of July, 1858, and Mrs. *Hepburn* thereupon became absolutely entitled to one-third of the £2500 stock, and the proceeds of sale of the *Ashburnham* property, subject to the life interest of *Henry Dorset*.

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Statement.

Mrs. *Hepburn* died without issue on the 29th of May, 1859. Mr. *Hepburn* died on the 28th of March, 1863. *Henry Dorset* died on the 5th of December, 1875.

After the death of *H. Dorset*, the trustees of *W. Michell's* will obtained a transfer of the £2500 stock and sold the *Ashburnham* estate, and paid into Court under the *Trustee Relief Act* the sum of £2402 7*s.* 4*d.*, being Mrs. *Hepburn's* share of the proceeds of the sale of the stock and of the *Ashburnham* estate.

Mr. *Hepburn's* executor petitioned for payment of the whole fund to him, on the ground that it was not bound by the settlement, and vested in Mr. *Hepburn* as having survived his wife and become her legal personal representative. Vice-Chancellor *Malins*, however, under the impression that this fund was at the death of *W. Michell* part of his residuary estate, held that it had devolved upon Mrs. *Hepburn* during the coverture, and was bound by the settlement, and that therefore one half only belonged to her husband's representative, and the other half of it to her next of kin. The executor of the husband appealed, the appeal being brought within twenty-one days from the time of the order being entered, but not within twenty-one days from its being pronounced. The appeal was heard on the 10th of April, 1878.

Argument.

Whitehorne, for the Respondents:—

This is an interlocutory order: *In re Baillie's Trusts* (1). The Petitioner asked for the whole fund. We never disputed his title to half, and the order gives him half. The case, therefore, is simply one of refusal of his application for more, and the appeal ought to have been brought within twenty-one days from the time of the order being pronounced: *Swindell* v. *Birmingham Syndicate* (2); *Trail* v. *Jackson* (3); *Berdan* v. *Birmingham Small Arms and Metal Company* (4).

THE COURT (*Jessel*, M.R., and *James* and *Cotton*, L.JJ.) held that the appeal was not from the refusal of an order, but from an order with which the Appellant was dissatisfied, and was therefore in time.

(1) 4 Ch. D. 785.
(2) 3 Ch. D. 127.
(3) 4 Ch. D. 7.
(4) 7 Ch. D. 24.

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1878
In re MICHELL'S TRUSTS.
Argument.

Glasse, Q.C., and *W. King*, for the Appellant:—

No part of the fund came into possession during the coverture, and the mere change of a future interest from contingent to vested is not enough to satisfy the words of the covenant: *In re Pedder's Settlement Trusts* (1); *In re Clinton's Trust* (2); *In re Viant's Settlement Trusts* (3); *In re Jones' Will* (4). The Vice-Chancellor went on *Archer* v. *Kelly* (5), which has no bearing on a covenant worded like this.

J. Pearson, Q.C., and *Whitehorne*, *contrà*:—

The interest was contingent at the time of the marriage, and during the coverture it became vested. A fresh title therefore accrued, which is enough to satisfy the words, the interest having altered its character: *Cornmell* v. *Keith* (6); *Archer* v. *Kelly*; *In re Browne's Will* (7).

Judgment, Jessel, M.R.

JESSEL, M.R.:—

It does not appear to me that any of the authorities cited here and in the Court below govern this case. The question for the Court to decide is a question as to the construction of the settlement. The settlement, though obviously drawn by a lawyer—probably by a conveyancer—contains a covenant which appears to have been inserted without sufficient consideration as to its wording, and no doubt it presents very great difficulties as regards its construction. One thing, at all events, is plain, that it applies to future acquired property of the wife. Another thing which I think we may consider settled by authority is, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning.

Now it was admitted on both sides, and could not be fairly contested, that this is a covenant in itself very difficult to deal with or to construe, and therefore I will look at the recital, which is,

(1) Law Rep. 10 Eq. 585.
(2) Ibid. 13 Eq. 295.
(3) Ibid. 18 Eq. 436.
(4) 2 Ch. D. 362.
(5) 1 Dr. & Sm. 300.
(6) 3 Ch. D. 767.
(7) Law Rep. 7 Eq. 231.

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that it had been agreed that "the said *Francis John Swaine Hepburn* should enter into the covenant for settling upon the same trusts any future property to which the said *Margaret Henrietta Michell* may become entitled after the solemnization of the said intended marriage hereinafter contained." It therefore is clear upon the recital that the covenant was to be a covenant by the husband for settling the property, and that the property to which it related was property to be acquired in future. Tried by these tests, this property does not fulfil that description. The interest of the wife certainly became absolute instead of being contingent, but it remained in remainder or reversion during the whole period. In fact what had happened was this, that both contingencies which affected the title of the wife determined during the coverture, but there still remained a life interest, which did not determine until many years after the wife's death. [His Lordship then, after reading the covenant, continued :—]

Now it is quite impossible to read that literally. The husband could not effectually settle, either by himself or with his wife, property in expectancy, that is, property which they had not got. Some words or other must be supplied, so as to make the covenant mean that the husband and wife will settle the property if, during the coverture, it so comes to them that they can effectually settle it. That agrees with the recital, and agrees with what one would expect the covenant to express, that when the husband would otherwise obtain the property he shall not keep it, but shall settle it upon the trusts of the settlement.

Taking the covenant in that sense, it does not apply to this property, which he was not able to settle at all at any time during the coverture. He could not dispose of it by any means, nor could he or his wife together do so. It was not disposable. It was not property that could be effectually settled, and, looking at the terms of the covenant and of the recital, it appears to me that it was not comprised within this settlement, and therefore that the Appellant ought to succeed.

James, L.J. JAMES, L.J. :—

I am of the same opinion. It appears to me that this property does not come within the words of the covenant, that is to say,

this is not property which came to or devolved upon the wife during the coverture. At the time of the coverture she had an interest, and she never during the coverture acquired an interest in possession. I agree with the Master of the Rolls that the object of covenants of this kind is to exclude the husband's right, so as to make him bring into settlement that which he would otherwise take as his own property, and deal with as he liked, subject to the wife's equity of settlement; and I am of opinion it was never intended by such a covenant as this to bind the wife in case of her surviving. If the wife had survived the husband, then you could not in any way have compelled the wife to have brought this fund into settlement for the purposes of that settlement, and exclude herself from dealing with it afterwards in any way she thought fit. If the wife was not bound by it, then the legal personal representative of the wife is not bound by it, although that legal personal representative happens to be the husband.

COTTON, L.J.:— Cotton, L.J.

The real question which we have to decide is whether this property comes within this covenant on its fair construction, in which, of course, I take this into account, that if on any previous occasions the Court has laid down a rule applicable to this case, we must follow it, and construe the covenant with regard to any rule which the Court has laid down. But, in fact, it is conceded that there is no case applicable to the present, except that *Archer* v. *Kelly* (1), where the covenant was something like the one now before us, was relied upon, and it was contended that the Court there laid down the rule that property would be brought within such a covenant if a change in the nature of the wife's interest in it took place during the coverture. But I do not think that the Court laid down any such rule. What the Court said in *Archer* v. *Kelly* was this, that where the covenant is for the settlement of property to which the wife shall become entitled during the coverture, without saying more, then if property to which she was at the time of the marriage entitled in reversion falls into possession during the coverture, she thereby becomes entitled within the meaning of

(1) 1 Dr. & Sm. 300.

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the covenant. That is reasonable enough, for as it falls into possession during the coverture, the husband, apart from the covenant, takes it absolutely, and the object of these covenants is to prevent him from taking absolutely, and to bind for the benefit of the wife and of the children what he would otherwise take absolutely. That does not apply to such a case as this, where the wife was contingently entitled to the property at the time of the marriage, and never during the coverture acquired an interest in possession.

Now, does it come within the words of the covenant? The covenant does not speak of property which "shall become vested," or anything of that kind, but only of property which shall come to or devolve upon the wife or upon the husband in her right during their joint lives. Can it be said that this property in any way came to the wife, or devolved upon the wife or the husband in her right during their joint lives? In my opinion it is impossible to say so. I am therefore of opinion that it was not bound by the covenant.

Solicitors: *Dunster; Bridges, Sawtell, & Co.*

C. A. 1877 V.-C. H. *Nov.* 27. C. A. 1878 *May* 8.

In re NEWMARCH. NEWMARCH *v.* STORR.

[1876 N. 45.]

Administration—Will—Mortgage Debt—17 & 18 *Vict. c.* 113 (*Locke King's Act*)—30 & 31 *Vict. c.* 69—*Charge of Debts on other Real Estate.*

10 Ch D 463 13 Ch D 356 16 Ch D 324

A charge of debts on part of testator's real estates in exoneration of the rest without specially referring to his mortgage debts, is not a sufficient expression of an intention contrary to the rule established by *Locke King's Act* to exonerate the mortgaged estate.

Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons; and the devisees must contribute according to the value of their respective portions.

A testator, nearly the whole of whose real estate was subject to a mortgage debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate and in exoneration of his other real estate with the

payment of all his just debts," and he devised another part of his real estate to his daughter:—

Held (reversing the decision of *Hall*, V.C.), that there was no sufficient declaration of a contrary intention under *Locke King's Act*, and that both the devisees must contribute rateably to payment of the mortgage debt.

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Statement.

F. B. NEWMARCH, by his will, dated the 15th of October, 1875, after appointing the Defendants, *C. Storr* and *J. Shaw*, his executors and trustees, and giving various specific and pecuniary legacies, devised the close of land which he had purchased of Messrs. *Collinson* at *North Cave*, called *Bean Butts*, which was then in the testator's occupation, and the seven cottages at *North Cave*, which he had purchased of Miss *Hewson*, to his trustees in trust for his wife for life, and after her death in trust to sell the same and divide the proceeds among his children as therein mentioned. The testator then devised a house, garden, and orchard, situate at *North Cave* aforesaid, which he described as then in the occupation of *Robert Dunning*, and certain other hereditaments in the occupation of his son-in-law, *E. Nickless*, to his daughter *Elizabeth*, the wife of *E. Nickless*, during her life, and after her death to her children. And the testator then proceeded as follows: "And I devise the mill, messuage, lands, and other hereditaments now in my own occupation, and also all other my real estate whatsoever and wheresoever not hereinbefore otherwise disposed of (except estates vested in me as mortgagee or trustee), charged nevertheless in aid of my personal estate and in exoneration of my other real estate with the payment of my just debts and testamentary expenses, and I bequeath the residue of my personal estate not hereinbefore otherwise disposed of to the said *C. Storr* and *J. Shaw* in trust to convert the same into money by sale or otherwise, and after paying such debts and the pecuniary legacies hereinbefore bequeathed, in trust to divide the net residue equally among my three sons, *Ingram Newmarch*, *Henry Newmarch*, and *Edwin Newmarch*."

The testator died in November, 1875. His personal estate was sworn under £2000. His debts consisted of a mortgage debt of £1000, and simple contract debts to the amount of about £300.

The present action was brought by the testator's three sons against the executors for the administration of the estate. Several difficulties arose on the interpretation of the will, but the only

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question which it is necessary to report was as follows: At the date of the testator's death and of his will all his real property, except the cottages purchased of Miss *Hewson*, were subject to a mortgage for £1000 effected in 1871, and the question now arose whether the mortgage debt was to be borne rateably by all the devisees of the property subject to it, or exclusively by the Plaintiffs under the special direction contained in the residuary devise.

The action came on for further consideration and upon summons to vary the Chief Clerk's certificate, before Vice-Chancellor *Hall*, on the 27th of November, 1877.

Argument.

W. Pearson, Q.C., and *Macnaghten*, for the Plaintiffs, contended that *Locke King's Act* (17 & 18 Vict. c. 113) applied notwithstanding the special direction contained in the will. They referred to *Sackville* v. *Smyth* (1).

Dickinson, Q.C., and *Williamson*, for *Elizabeth Nickless*, were not called on.

W. Barber, for the trustees.

Judgment, V.-C. H.

HALL, V.C.:—

If I acceded to the argument of Mr. *Pearson*, I should, I think, be doing violence to the express declaration of intention of the testator. The testator has said that the property comprised in the disposition is to be charged in aid of his personal estate and in exoneration of his other real estate with the payment of his just debts and testamentary expenses. I must give effect to the testator's direction.

C. A.

From this decision the Plaintiffs appealed. The appeal was heard on the 8th of May, 1878.

Argument.

Macnaghten (*W. Pearson*, Q.C., with him), for the Appellants:—

The words "just debts" do not include this mortgage debt. Therefore the direction contained in the will is not a sufficient declaration of intention to take the case out of *Locke King's Act*. It might have been sufficient before the passing of the *Amend-*

(1) Law Rep. 17 Eq. 153.

ment Act, 1867 (30 & 31 Vict. c. 69), under the authority of *Eno* v. *Tatham* (1) and *Moore* v. *Moore* (2); but the 1st section of the Act of 1867 (3) overruled that interpretation of *Locke King's Act*, and enacted that a simple charge of debts on personal estate should not be deemed a sufficient declaration of intention to exonerate the mortgaged estate; and although a similar charge of debts on other real estate is not mentioned in the Act, yet the principle is the same in both cases. The decisions in the Court of Chancery were based upon the assumption that "debts" or "just debts" included mortgage debts. The principle of the Act of 1869 was, that, in considering whether a declaration in a will was sufficient to take the case out of the operation of *Locke King's Act*, the words "debts" or "just debts" were not to be held to include mortgage debts: *Sackville* v. *Smyth* (4); *Nelson* v. *Page* (5). The construction contended for by the Respondents makes the words "in aid of my personal estate" surplusage. For those words could not create a charge of the mortgage debt on the personal estate, that being contrary to the Act of 1867. The words would therefore have no effect at all.

BAGGALLAY, L.J.:—Might not the testator mean to charge such of his just debts as were payable out of the personal estate on the devised estate in aid of the personal estate, and such of his debts, namely, the mortgage, as were not payable out of the personal estate, on the devised estate in exoneration of the other real estates?

Dickinson, Q.C., and *Williamson*, for *Elizabeth Nickless*:—

Locke King's Act has no application to a case of contribution

(1) 3 D. J. & S. 443.

(2) 1 D. J. & S. 602.

(3) 30 & 31 Vict. c. 69, s. 1: "In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

(4) Law Rep. 17 Eq. 153.

(5) Ibid. 7 Eq. 25.

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between devisees of different portions of an estate the whole of which is subject to one mortgage. The Act of 1867 has no application to this case. It only refers to a charge of debts on the personal estate. It would be extending the operation of the Act in an unwarrantable manner to make it include a charge on other parts of the real estate. But even if the Act of 1867 applies to the case, there is a sufficient expression of an intention to include the mortgage debt to satisfy the Act. The words "in exoneration of my other real estate" must have reference to the mortgage debt, or they have no meaning.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

Two questions are raised by this appeal of considerable difficulty, one as regards the construction of *Locke King's Act*, and the other as regards the interpretation of the testator's will.

The first question, namely, that which relates to the Act, is the most material. The Act is not an easy one to construe, and the point now before us gives rise to considerations which do not appear to have been discussed much, if at all, in previous cases. In the first place, does the Act apply at all where there is a question of contribution between devisees of different portions of an estate subject to one mortgage debt? Secondly, if this question is answered, as I think it must be, in the affirmative, what is a sufficient declaration of contrary intention by the testator? And, thirdly, is there a sufficient declaration of contrary intention in this will to satisfy the Act?

On the first question I think it is clear that the Act must apply, because it says so in express terms. The Act provides (sect. 1) that where a testator shall die seised or possessed of land or hereditaments charged with any sum of money by way of mortgage, "and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which

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the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." In this clause I understand the words "or any other real estate of such person" to mean "other real estate not descended or devised to such heir or devisee," not "other real estate not comprised in the mortgage." Therefore there is an express enactment that unless the testator has signified a contrary or other intention, the different parts of the charged estate shall in the hands of the devisees bear proportionate parts of the mortgage debt according to their value. In this will we have different portions of the mortgaged property given to different devisees, and therefore, according to the express words of the Act, they must bear their rateable proportion of the mortgage debt unless a contrary intention is signified.

Then comes the second question, What is a contrary intention? Suppose the testator directed that all his just debts should be paid out of his personal estate. The mortgage debt is, of course, a just debt. Would, therefore, that general direction be a sufficient indication of a contrary intention? It was decided in *Moore* v. *Moore* (1) that it would be sufficient. A similar conclusion was arrived at in *Eno* v. *Tatham* (2). There the testator gave all his personal estate to his executors "subject to the payment of his just debts," and it was held that this had the same effect as a direction to pay his just debts out of his trust estate, and was sufficient to take the case out of the operation of the Act. Then another Act was passed in 1867 to explain *Locke King's Act.* It was a construing and explaining Act; it did not profess to amend the former Act, but to set aside the interpretation that had been put upon it; it was, in fact, a polite way of overruling the decisions of the Court of Chancery. That Act provided that, in the construction of future wills, "a general direction that the debts, or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of

(1) 1 D. J. & S. 602. (2) 4 Giff. 181; 3 D. J. & S. 443.

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his real estate." It is true that the Act only refers to a direction to pay debts out of personal estate, but the reason for that was that there had been a decision of the Court on that point. But is it possible consistently to hold that a direction to pay debts out of the personal estate does not evince a contrary intention to the rule established by *Locke King's Act*, and that a direction to pay them out of real estate, or out of a mixed estate of realty or personalty, does evince such a contrary intention? I think not. The ground of the decisions of the Court of Chancery was that "just debts" was a known term, and that it included mortgage debts. That ground must be considered to have been done away with by the Act of 1867, because that Act said in effect that the word "debts" was not to include mortgage debts unless there were express words shewing an intention that it should do so. This enactment must be considered as imported into the original Act. It is impossible not to hold that the same words that are insufficient to charge the testator's personal estate are insufficient also to charge his other real estate. I therefore take it to be clear that a charge of debts on personalty or on realty does not now sufficiently indicate an intention to exonerate the mortgaged estate.

The remaining question is, whether this applies to the will before us. The mortgage debt is not mentioned at all. [His Lordship read the clause in the will set forth above.] As I read the clause, I am of opinion that the words "my just debts" in this will do not include the mortgage debt, unless there is something in the context to shew that it was intended to be included. Is there anything to this effect in the context? The only words that are relied on are the words "in aid of my personal estate and in exoneration of my other real estate," and the whole argument has turned on these words. It was said that, on the construction of the Appellants, the words "in exoneration of my other real estate" could have no meaning given to them, because you do not exonerate them at all unless you exonerate them from the mortgage debt. But the same difficulty would arise with respect to the words "in aid of my personal estate" on the other construction. The one set of words are reduced to a surplusage by one construction, and the other set of words by the other con-

struction. So one difficulty can be set off against the other. I think the true construction of the clause is, that the real estate is to be exonerated only to the same extent as the personal estate is aided; and by virtue of *Locke King's Act* the personalty is not liable to the payment of the mortgage debt. Otherwise, the logical result would be that the effect of the clause would be to charge the personal estate, a result which would be contrary to the express words of the Act of 1867. For these reasons, I think that the decision of the Vice-Chancellor on this point must be reversed.

BAGGALLAY, L.J.:—

I confess that I have had serious doubts on this question, and those doubts have not been entirely removed by the arguments of counsel or by the judgment of the Master of the Rolls. But as Lord Justice *Bramwell* agrees with the Master of the Rolls, my doubts are not important to the decision of the Court, and as they do not extend beyond doubts, I will content myself with merely stating them. *Locke King's Act* laid down two rules for the guidance of executors in the administration of estates where there was a mortgage debt. One was negative, that it was not to be paid primarily out of the personal estate; the other positive, that it was to be paid primarily out of the real estate charged. These rules must be kept distinct. The question on this appeal is not whether the debt should be paid out of the personal estate or out of the other real estate not charged with the mortgage, but whether it should be paid out of one particular portion of the property charged with the mortgage.

The Act of 1867 dealt only with the question whether the mortgage debt should be paid out of the personal estate. It is confined to that negative rule. But the substantial question here is, whether a contrary intention has been expressed that the portions of the property subject to the mortgage should not be charged in proportion to their value. I concur with the Master of the Rolls as to the extended construction of the Act of 1867—that it must not be confined to a direction to pay debts out of personal estate. But I have considerable difficulty as to the effect of the words of this particular will. I suggested in the course of the

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argument a doubt whether they might not mean that as to those debts which were properly payable out of personalty there should be a charge on the devised estate in aid of the personalty, and that as to those which were payable out of the realty there should be a charge on the devised estate in exoneration of the other parts of the mortgaged estate. I still feel that doubt, but I willingly bow to the opinion of my learned colleagues.

Judgment, C. A. Bramwell, L.J.

BRAMWELL, L.J.:—

I have nothing to add to the observations of the Master of the Rolls. I concur with him both in his conclusions and his reasons.

Solicitors for Appellants: *Monckton, Long, & Co.*, agents for *F. H. Anderson, York.*

Solicitors for Respondents: *Lambert, Petch, & Shakspear*, agents for *Burland & Son, South Cave; Williamson, Hill, & Co.*, agents for *England & Son, Goole.*

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DUNKIRK COLLIERY COMPANY *v.* LEVER.

[1875 D. 27a.]

Practice—Special Referee—Reference as to Damages—Power of Court to review Report of Referee—Judicature Act, 1873, *ss.* 56, 57; *Rules of Court*, 1875, *Order* XXXVI., *r.* 34.

When a Judge has referred the amount of damages in an action to a special referee, he may accept it wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit to the referee for amendment, but he has no power to alter or vary it.

The Master of the Rolls referred the amount of damages to a special referee, and on the report being made, being dissatisfied with the principle on which the referee had proceeded, assessed the damages himself, using for the purpose the shorthand notes of the evidence heard before the referee. The Court of Appeal reversed his decision, and remitted the case to the referee to rehear the matter, with liberty to report specially on any facts.

Whether a referee ought to state his reasons, *quære.*

Statement.

THE action in this case was brought by the *Dunkirk Colliery Company*, the lessees of a coal mine in the county of *Chester*, against *Ellis Lever*, carrying on business under the firm of *Ellis*

Lever & Co., to enforce performance of an agreement dated the 28th of April, 1875, to sell to him 15,000 tons of cannel coal, to be delivered at the pit siding at the rate of 300 tons per week, at the price of 26*s.* per ton, payable by monthly payments. The Plaintiffs stated that the Defendant had refused to perform the agreement; that the price of cannel coal had fallen considerably; and that they had incurred great damage by the breach of the agreement. The Plaintiffs afterwards made a fresh contract with the *Manchester* Corporation, and claimed as damages the difference between 26*s.* a ton and the price which they had obtained under the contract with the *Manchester* Corporation.

At the trial of the action before the Master of the Rolls, on the 19th of December, 1876, his Lordship held the Plaintiffs entitled to relief, and ordered that the Defendant should pay the Plaintiffs their costs of the action, and that it should be referred to Mr. *W. R. Kennedy*, as special referee, to inquire and report to the Court what damages had been sustained by the Plaintiffs by reason of the non-performance of the agreement, and that after he had made his report such further order should be made by the Judge in Chambers with respect thereto and to the subsequent costs as should be just.

Mr. *Kennedy* made his report, dated the 23rd of July, 1877, and thereby certified that he found that the damages in the action for the non-performance of the agreement were £2967 10*s.*, being the difference between the contract price and the prices which the Plaintiffs might, acting reasonably and under all the circumstances of the case, have obtained in the market for the various deliveries of the contract quantity of cannel at their due dates during the period over which, according to the terms of the agreement, the deliveries were to extend.

On the 8th of February, 1878, the Plaintiffs moved before the Master of the Rolls that the report of the special referee might be altered or varied, or remitted for amendment to the referee, with directions that the damages should be assessed upon the principle that the true measure was the difference between the market price of the cannel and the price for which the Plaintiffs sold the cannel to the *Manchester* Corporation, and not on the principle stated on the face of the said report, upon the ground that there was no

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market for cannel, and that the sale to the *Manchester* Corporation was a reasonable and proper course to pursue under the circumstances. The Master of the Rolls, acting on his view of the evidence which was adduced before the referee, made an order that the Defendant should pay to the Plaintiffs £5300 for damages in the action, instead of £2967 10*s.* found by the report.

The Defendant appealed from this order.

Argument

Marten, Q.C., *Gully*, Q.C., and *North*, Q.C., for the Appellant:—

The Master of the Rolls had no jurisdiction to make an order to vary the report of a referee, any more than a Judge can vary the amount of damages found by a jury. If he was dissatisfied with it, he should have sent the matter back to the referee for reconsideration. The evidence on which the Master of the Rolls based his opinion was not properly before him; he had only the shorthand notes of the evidence taken before the referee. The practice is regulated by the *Judicature Act*, 1873, ss. 56, 57, and Rules of Court, 1875, Order XXXVI., rule 34.

Chitty, Q.C., *Jordan*, and *Phipson Beale*, for the Plaintiffs:—

The Master of the Rolls had sufficient evidence before him on which to proceed. The referee proceeded on a wrong principle in assessing the damages, and as the principle and the facts on which he proceeded were stated on the face of the award, the Master of the Rolls was right in correcting it, instead of putting the parties to the expense and delay of another reference. There was no evidence of there being any market for cannel coal at the time when the contract was broken. The sale to the *Manchester* Corporation was the first reasonable sale which they were able to effect, and the difference between that price and the contract price is the true measure of damage: *Hinde* v. *Liddell* (1).

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls cannot be sustained, upon the ground that it appears to me that there was no jurisdiction to make the order which he has made. He had made a reference to a special referee, to inquire and report

(1) Law Rep. 10 Q. B. 265.

to the Court what damages had been sustained by the Plaintiffs by reason of the non-performance of the terms of the agreement of the 28th of April, 1875, on the part of the Defendant. It really was a reference to inquire and report what damages had been sustained, which would be just the same as if there had been, under the old practice, a writ of inquiry in an action at common law where the Defendant admitted the breach and there was nothing to ascertain but damages. That is really what the report was to be. The special referee reported the damages at a particular sum, and stated the principle upon which he had ascertained that amount of damages; and upon the principle as stated it appears to me there really is no doubt whatever that the referee was right, if the facts had warranted him in applying that principle. As at present advised, I am of opinion that the facts did not warrant the application of the principle, because in stating the principle the referee has assumed as a fact that there was what may be called a market for the sale of the goods which the Plaintiffs had undertaken to sell and the Defendant had undertaken to buy from the Plaintiffs. I cannot find in all the evidence taken before the referee, which has been read to us by consent from the shorthand notes, that there was any such market, and therefore I think that he, on that evidence, was not warranted in saying he could apply the principle which he has applied. Thereupon there was a motion made to the Master of the Rolls to alter or vary that report. I am of opinion that the Court has no jurisdiction to alter or vary the report of the referee, any more than it has power, except by arrangement at the trial, to alter or vary the verdict of a jury finding the amount of damages. The Judge had power to adopt, wholly or partially, the report; but he has not adopted it either wholly or partially, but has entirely disregarded it, and has taken upon himself to assess the damages, not upon the report, either wholly or partially, but upon the shorthand writer's notes of what had taken place before the special referee. I am of opinion that that could not be done. The Judge, in my opinion, could not decide the amount of damages merely upon evidence taken in that way and for that purpose on the inquiry, any more than the Court in *Banc* at *Westminster* in any of the Common Law Courts could have dissented from the damages found by a jury, and have taken all the

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evidence which was laid before a jury, and have said that upon that evidence they should assess the damages very differently. The motion that was made before the Master of the Rolls was that the report should be altered or varied or remitted for amendment to the referee. Agreeing, as we do, with the Master of the Rolls, that the referee had not got the facts before him to warrant the application of the principle, the latter part of the motion would seem to be a right application to have made to the Master of the Rolls; and then it ought to have gone back to the referee or been put in another mode of trial to assess the damages according to the real facts of the case and the application of the right principle to those facts. I cannot see where or how the evidence on which the Master of the Rolls acted was referred to. The order of the Master of the Rolls does not refer to any evidence as having been before him, or as having had any evidence taken before him on which he had a right to alter the report without the consent of the parties, or upon which he could come to any conclusion as to the amount of damages. Therefore that is fatal, as it seems to me, in point of form. We have no facts before us from which we can either differ from or agree with the Master of the Rolls upon the amount of damages he has assessed instead of that which the referee has assessed.

What is the principle on which the Court ought to refer it back to the referee? I do not think the Plaintiffs were entitled to have it referred back on the principle that the true measure was the difference between the contract price and the price for which the Plaintiff sold the cannel to the *Manchester* Corporation, for in fact we have it in evidence that they never did sell the particular 15,000 tons which were the subject of the contract with the Defendant to the *Manchester* Corporation. What the Defendant agreed to take was 300 tons a week for so many weeks, and what was sold to the *Manchester* Corporation was a similar thing; but it was under a new contract for a different period, beginning at some day after this contract. In that case the facts would not warrant the application of the principle, because these particular 15,000 tons never were sold to the *Manchester* Corporation any more than to anybody else. Under those circumstances the only thing that we can do is to send it back to the referee with an intimation that we are of

opinion upon the facts (agreeing with the Master of the Rolls in that respect), that the facts do not warrant the application of the principle mentioned in the award, namely, that there was what may be properly called a market. What I understand by a market in such a case as this is, that when the Defendant refused to take the 300 tons the first week or the first month, the Plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the *Exchange*, or cotton at *Liverpool:* that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances. There being no market, then, it seems to me impossible to lay down a general principle upon which the referee is to assess the damages, but what the Plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract; the person who has broken the contract not being exposed to additional cost by reason of the Plaintiffs not doing what they ought to have done as reasonable men, and the Plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business. And it appears to me, assuming the Plaintiffs to have acted like reasonable men of business under all the circumstances of the case, the damage they have sustained would be exactly the same as if, instead of its being a wilful refusal on the part of the Defendant to take the coal, the Defendant had become bankrupt or insolvent, or had died or been prevented in some way from fulfilling their contract, and there had been nobody from whom the Plaintiffs could have recovered the damages. I think it must go back to Mr. *Kennedy* to review his report. He must re-hear the case and report upon it, and I think it is right that there should be liberty for him to report any facts which he considers proved in addition to the principle upon which he proceeds. When that is done the matter may be disposed of, as I think, without further difficulty.

BAGGALLAY, L.J. :— Baggallay, L.J.

It appears to me that there has been a miscarriage in this case that can best be remedied by referring the matter back to the

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referee in the manner proposed by the Lord Justice. It was quite open to the Master of the Rolls, if he had thought fit so to do, to have made in substance the order he has made, namely, for the payment by the Defendant to the Plaintiffs of £5300 for damages in the action, and of the costs of the action upon the original hearing, provided there had been before him the proper evidence to have made a foundation for such an order; but instead of adopting that course, the Master of the Rolls in the exercise of his discretion sent the matter to a special referee to assess the damages which the Plaintiffs had incurred. When the matter came back again before him, having made that reference under the 56th section of the *Judicature Act*, it was quite open to him to adopt the report which the referee made, either wholly or in part; but the view that I take of the case is that it was not open to him to amend or vary the report made by the referee in the same way as he might a certificate from his own Chambers. He had power to adopt it, wholly or in part, but not to amend or vary it. If he thought that the referee had proceeded upon any wrong principle in assessing the damages, or had formed any wrong opinion upon the facts brought under his consideration, the proper course then was for him to remit the matter to the referee for further investigation; but at the same time it was open to him to utterly and entirely disregard what had been done by the referee, and then his duty was to have proceeded and determined the action upon the evidence that might be properly before him.

Now, the order which is now brought under appeal before us is quite silent as to any evidence having been before the Master of the Rolls at all. We are told, and probably correctly, that the short-hand notes of the evidence which was before the referee were used by both sides, more or less, in the course of the argument which was addressed to the Master of the Rolls, and we have it also stated that an application was made—for it was understood that the proceeding before the Court was to be considered as an application for the final judgment of the Court—for an opportunity of adducing further evidence to meet matters which had been raised in the investigation before the referee. That application was not entertained by the Court. We are, therefore, dealing with an order which, upon the face of it, purports to vary the report

which the referee has made: because it says the judgment is to be for £5300 damages in lieu of £2967 10s. which is found in the report; and, for the reasons which I have mentioned, it was not within the jurisdiction of the Master of the Rolls to make such an order. I am bound to say, after listening with the best attention I could to the portions of the evidence which were read to us on this appeal, and after having cast my eye over the copy of the shorthand notes, that it seems to me that there has been a great deal of evidence which requires more explanation. I think the suggestion that the referee in his report should draw attention to the nature of the evidence before him, and to the facts before him bearing upon the more important part of the case, is a very good and valuable suggestion; so that when the report comes back again, or rather when a new report is made, it will be in a state in which it can be dealt with by the Court.

BRAMWELL, L.J.:—

I am entirely of opinion that the order of the Master of the Rolls cannot be sustained. The notice of motion before him was that the report of the referee should be altered or varied, or remitted for amendment, and it seems to me clear that it could not have been properly altered or varied. How is it possible for the Master of the Rolls to alter or vary the report of the referee? Accordingly, when you look at the order made by the Master of the Rolls as it is drawn up, it is this: "Upon motion this day made that the report be altered or varied or remitted, &c." What does he proceed to do? Not to order any one of these three things, but the order says, "Upon hearing counsel, &c., this Court doth order that the Defendant do on or before a certain date pay £5300 for damages in the action for non-performance of the contract." That is not anything prayed for by the motion, and it seems to me manifest, with great submission, that it is not warranted by any materials before him. It seems to me, therefore, that the order of the Master of the Rolls cannot be supported. Then what is to be done with the case? If the finding of the referee is not to be adopted, I do not see anything that can be done except to comply with the alternative prayer, that it be remitted to him for reconsideration; and I think it is due to the

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learned gentleman to say that we do not direct him to find differently to what he has found already. If he in his conscience thinks he can only find the same thing over again, he must do so. He is the judge of the facts and not we. I wish it particularly to be understood that I should not have consented to give a judgment that the learned referee was wrong, he having had the witnesses before him, and having had an opportunity of judging how far those on the one side were more or less trustworthy than those on the other, without careful consideration of the materials upon which the Master of the Rolls acted.

I should like further to say for the assistance of the referee, that I think he should pronounce his decision and not give his reasons. I am now told that the Master of the Rolls has decided in some case that the referee ought to state his reasons. If he has done so, all I can say is that he gave a direction which a most experienced and learned Judge said would, if acted upon by juries, render trial by jury impossible. If juries had to give reasons for their verdict, trial by jury would not last five years. The same thing cannot be said to such an extent with respect to a lawyer, let us hope, or otherwise it would be applicable to ourselves; but I think it would be a dangerous rule to lay down, that a man should give minute reasons for the conclusions at which he arrives.

[His Lordship then made some observations for the guidance of the referee as to the breach of the contract and the measure of damages in the case, and continued:—]

I repeat that what I wish to say for the benefit of the referee is this. He is not to understand that he is told to reverse his decision and to adopt that of the Master of the Rolls. The thing is remitted to him for his reconsideration with an expression of an opinion by the majority of those who have heard the case that he was wrong in his conclusion, and no doubt he will consider it as impartially as it is possible for a man to do who has expressed an opinion upon the matter before, and will come to a correct conclusion. If he can state any facts upon his report, or any figures that will enable the Court to revise it and adopt a different conclusion—to adopt the report either wholly or partially—it may be done; for instance, he may say he acted upon the assumption that the Plaintiffs could not sell without they sold to

the *Manchester* Corporation, or that he found 19*s.* a ton as the price, and so on.

The Court made an order that it should be remitted to the referee to rehear the matter and report accordingly, with liberty to him to report specially any facts.

Solicitors for Plaintiffs: *Sharpe, Parkers, & Co.*, agents for *J. & J. Hibbert, Hyde.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Rawle*, agents for *Cooper & Sons, Manchester.*

OWEN *v.* WYNN.

[1875 O. 25.]

Practice—Inspection of Documents—Court Rolls—Action by a Person claiming adversely to the Lord.

The Plaintiffs claimed to be owners in fee simple of certain land, and the Defendant alleged that they were freehold tenants of a manor of which he was the lord; and that they had only customary rights over the land. The Plaintiffs asked for inspection of the Court rolls of the manor:—

Held (reversing the decision of *Bacon*, V.C.), that they were not entitled to inspection.

Statement.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, made on an adjourned summons, upon an application to consider the sufficiency of the Defendant's affidavit as to documents.

The Plaintiffs, who claimed under *Anne Warburton Owen*, deceased, sought to establish their rights as tenants of the *Warren Farm, Montgomeryshire*, to a tract of mountain pasture or sheep-walk as parcel of the *Warren Farm*, and to the mines and minerals under the tract, and to the rights of sporting over the same, and to the fences, and to all other usual incidents of the ownership in fee simple of freehold lands, in respect of the tract or sheep-walk. They also prayed an injunction to restrain the Defendant (the lord of the manor) from pulling down or otherwise interfering with the fences forming the boundaries of the tract of pasture or sheep-walk.

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The Plaintiffs derived their title to *Warren Farm* under a conveyance of the lord of the manor in 1685, and they averred that the tract of pasture, or sheep-walk, formed part of the *Warren Farm;* that it had for more than sixty years before the commencement of the suit been held and used as parcel of the said farm by the tenants thereof, for the purpose of depasturing their cattle and sheep, and for other agricultural purposes, and been in the exclusive possession of the tenants of the farm; and that under the circumstances it must be presumed to have passed to the Plaintiffs' predecessors in title, as part of the hereditaments conveyed by the deeds of 1685, and could not be presumed to be part of the wastes belonging to the Defendant as lord or owner of the manor or reputed manor.

The Defendant by his answer claimed to be entitled, as lord of the manor, to the soil of the sheep-walk in question, as forming part of the waste of the manor, subject to the right of the owner of *Warren Farm* for the time being as a freehold tenant of the manor, and of the other freehold tenants of the manor to "lyerst," or the right of depasturing sheep or cattle over the waste; but the right claimed by the Plaintiffs as owners of *Warren Farm* to the ownership in fee simple of the sheep-walk also, as part of the inheritance of the farm, was denied.

A summons having been taken out for production by the Defendant of documents in his possession, the Defendant by his affidavit objected to produce the documents set forth in the first part of the schedule—which, so far as is material for this report, he described as "manor records, and Court rolls, and copies thereof contained in five boxes, and a bundle of maps, plans, and drawings," on the ground that they related exclusively to his own title, and that none of them related to or tended to support or make evident the title of the Plaintiffs, or any or either of them. Certain other documents in the Defendant's possession were described as "a bundle of ancient deeds and muniments and a small bundle of several ancient MSS. marked C.," without further enumeration or identification.

The summons was heard before Vice-Chancellor *Bacon* on the 11th of April, 1878.

Kay, Q.C., and *Elton*, for the Plaintiffs:— Argument.

As freehold tenants of the manor by the Defendant's own admission, we are entitled to see the Court rolls, and all records and documents relating to the manor: *Warrick* v. *Queen's College, Oxford* (1); and the Defendant's claim to privilege cannot be maintained. The terms in which protection is claimed are insufficient: *Minet* v. *Morgan* (2). The other documents are insufficiently described, and in order to entitle the Defendant to have them protected from discovery, he must distinguish and specify the dates of the several instruments, and the names of the parties thereto: *Hare* on Discovery (3); *Fortescue* v. *Fortescue* (4); *Combe* v. *Corporation of London* (5).

Sir *H. Jackson*, Q.C., and *Freeling*, for the Defendant:—

The Plaintiffs are not entitled to inspect the Court rolls; they deny that they are tenants, and their action is entirely based upon that denial. If they are tenants of the manor, they have only customary rights over the sheep-walk, the freehold of which they claim. If they had acknowleged that they were tenants of the manor, they might use the Court rolls, but not otherwise.

Kay, in reply.

BACON, V.C.:— Judgment, V.-C. B.

No doubt there are imperfections in the affidavit, which in another affidavit may be easily cured if insisted upon. But the main point is as to the customary rolls. Upon the authority of *Warrick* v. *Queen's College, Oxford*, there is, I think, no reason suggested why the Plaintiffs should not see them. The Plaintiffs' suggestion is that they are freeholders of certain lands. The lord of the manor says, "No doubt you are a freehold tenant, but your tenancy is subject to my paramount rights," and he proposes to exercise those paramount rights. He can only exercise them, being lord of the manor, and the Plaintiffs can only hold subject to that exercise, being tenants of the manor. Therefore the customary rolls become of necessity the things to which reference is

(1) Law Rep. 3 Eq. 683.
(2) Ibid. 8 Ch. 361–363.
(3) Page 278.
(4) 34 L. T. (N.S.) 847.
(5) 1 Y. & C. Ch. 631.

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made for the purpose of proving one case or the other. The Plaintiffs are not to come into Court unprovided with the means of discussing that question with the Defendant. By the Defendant's own statement the Plaintiffs are the customary tenants, and, as customary tenants, they have a right to inspect the rolls. That is the real point in dispute between the parties; there is nothing else in it. The slight inaccuracy which I referred to may be easily cured, but the affidavit I think is defective in that other respect which has been mentioned, viz., that the Defendant does not say that the documents he objects to produce do not relate to the case made by the bill, which is the essence of the present application. The affidavit says they relate exclusively to his own title, and do not prove the Plaintiffs' title, but it does not say that they do not either prove or elucidate in some way the case made by the Plaintiffs in their bill. In that case they have the right to discovery from the Defendant.

C. A.

From this decision the Defendant appealed. The appeal was heard on the 22nd of May.

Argument.

Sir *H. Jackson*, Q.C., and *Freeling*, for the Appellant.

[They were stopped by the Court.]

Marten, Q.C., and *Elton*, for the Plaintiffs:—

According to the Defendant's own statement, the Plaintiffs are tenants of the manor; he cannot therefore resist our seeing the Court rolls.

[JESSEL, M.R.:—Is there any allegation in your bill that you are tenants of the manor?]

There is no direct allegation to that effect. One of our contentions, no doubt, is that we are independent freeholders; but if we fail on that point, we say that we are still entitled to rights over the sheep-walk as freeholders of the manor. Therefore, with a view to that alternative, we have a right to inspection of the Court rolls.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The Plaintiffs say in their original bill that they are owners of

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a certain farm which consists in part of mountain pasture. They claim exclusive ownership of this pasture. The Defendant says, "The allegations in your bill are all true except as to your title; you are really tenants of my manor, the pasture is part of my waste, and the acts which you call acts of ownership were really done in exercise of customary rights." Then the Plaintiffs amend the bill; they do not admit the existence of the manor, and they deny that they are tenants of it. They then call upon the Defendant to make an affidavit as to documents, and he makes an affidavit in which he says he has five boxes of documents relating to his manor. He swears that they relate exclusively to his own title, and do not tend to support the title of the Plaintiffs, and he denies the right of the Plaintiffs to see them. I should have thought, under these circumstances, that there was nothing to argue. The Plaintiffs say they have a right to see the documents, although they claim adversely to the manor and the manorial rights, they say, "We should like to see your title before the trial, in order to pick holes in it." That is certainly not a course which the Court will sanction. This case is not like *Warrick* v. *Queen's College, Oxford* (1). There the Plaintiff alleged that he was a tenant of the manor; the only dispute was as to the extent of the customary rights, as to which the Court rolls might furnish material evidence. The decision of the Vice-Chancellor must be reversed.

Judgment, C. A.
Jessel, M.R.

JAMES, L.J.:—

James, L.J.

I am of the same opinion. When the case comes to be considered it is this: the Plaintiffs say, "We hold certain freehold land which is our own absolute property, and we can prove it by certain acts." The Defendant says, "No, it is my land." That is the sole question between them. Then the Defendant says, "I have a number of title-deeds which do not make out your title. I admit that you have limited rights over the land, which explain everything which would *primâ facie* shew your title; that is how I am going to displace your claim." The Plaintiffs cannot say, "Let us see the evidence which you are going to use in support of your case." They are not entitled to do this.

(1) Law Rep. 3 Eq. 683.

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BRAMWELL, L.J.:—

The way in which the case strikes me is this: the Plaintiffs say, "If our claim is right, we are not entitled to see the documents; but we may be in the wrong, in which case we should be entitled to see them. Therefore, as we may be wrong, shew them to us."

Solicitors: *Milne, Riddle, & Mellor*, agents for *Howell, Jones, & Howell, Welchpool; Dean & Taylor*, agents for *Longueville, Jones & Williams, Oswestry.*

C. A. 1878 V.-C. M. *May* 2. C. A. *May* 29; *June* 5.

POWELL *v.* JEWESBURY.

[1876 P. 168.]

Demurrer to amended Statement of Claim—Partial Demurrer.

A Defendant put in a statement of defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The Defendant obtained leave to amend his statement of defence, and put in a statement of defence and a demurrer to part of the statement of claim:—

Held, that the rule of Chancery practice, that a Defendant cannot demur to what he has previously answered, is no longer in force; that leave to amend the statement of defence authorized the putting in a demurrer to part of the statement of claim; and that the Defendant's pleading was regular.

A demurrer "to such part of the amended statement of claim as claims damages alleged to have been sustained by reason of the alleged wrongful acts of the Defendant in opening the accounts therein in that behalf referred to":—

Held, good in form.

Statement.

THIS was an appeal by the Defendant from a decision of Vice-Chancellor *Malins* reserving to the trial the benefit of a demurrer to certain parts of an amended statement of claim.

The case made by the statement of claim was to the following effect:—*Skyrme*, who died in April, 1873, was up to his death the solicitor of the Plaintiff, who was a maiden lady. In July, 1873, Mr. *Collins*, her then solicitor, casually learnt from the solicitors of the *Gloucestershire Banking Company* at *Ross*, in *Herefordshire*, that the Plaintiff had an account at their bank, and that they held deeds of hers as security. The Plaintiff, who had never opened any account with them, caused inquiry to be made, and the com-

pany furnished her with copies of two accounts, the first of which had been opened by *Skyrme* in the Plaintiff's sole name. It commenced in 1864 and closed in January, 1873, with a balance of £614 16*s.* 5*d.* to the Plaintiff's debit. The second account was opened by *Skyrme* in the joint names of the Plaintiff and *F. J. Partridge.* It commenced in 1865 and ended in June, 1873, with a balance of £470 10*s.* to the Plaintiff's debit. *Skyrme* was in the habit of drawing cheques on the first account, which he professed to sign as the Plaintiff's agent, and by the end of June, 1866, he had overdrawn it to the extent of more than £2000, but he from time to time paid in various sums, so that in 1873, as mentioned above, the account was overdrawn only to the extent of £614 16*s.* 5*d.* All these transactions were without the Plaintiff's knowledge, the only cheque she ever drew upon the bank was one for £1650, which she drew by *Skyrme's* direction to enable him to pay for some property which she was purchasing, and she drew it in the belief that some money of hers which had been called in for the purpose of the purchase had been lodged by him with the bank for safety. This £1650 formed one item in the first account. On the 11th of June, 1874, the bank commenced an action to recover from Miss *Powell* the balance of both accounts, but shortly afterwards abandoned the claim on the second account. On the 18th of August, 1874, they filed a bill in Chancery to foreclose the Plaintiff in respect of a deposit security which *Skyrme* had given in her name, but they afterwards allowed this bill to be dismissed for want of prosecution, and proceeded with the action solely for the recovery of the £1650 for which the Plaintiff had drawn a cheque. The action came on for trial, but was referred to arbitration, and in May, 1876, the arbitrator made an award against Miss *Powell* for £500 5*s.* 8*d.* and costs, the ground being that she had incurred a liability by signing the cheque for £1650. Miss *Powell* then commenced this action in July, 1876, against the public registered officer of the banking company, alleging the above facts, and that *Skyrme* had paid to the company various sums of money, with notice that they were the Plaintiff's money, and for which she had never had credit, and that any memorandum of deposit of deeds purporting to be executed by the Plaintiff was a forgery, and the Plaintiff claimed, 1, to have a

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general account taken of the dealings between the Plaintiff and the bank; 2, to have her deeds delivered up to her, and any memorandum of deposit delivered up and cancelled; 3, an injunction to restrain the company from parting or dealing with the deeds, and from enforcing the award until the deeds had been given up to the Plaintiff; and, 4, damages sustained by reason of the wrongful acts of the company.

The Defendant put in a statement of defence, not demurring to any part of the statement of claim. The Plaintiff then amended her statement of claim, and introduced, among other things, the allegation that *Skyrme* had advanced moneys of the Plaintiff to *Partridge* on two bonds conditioned for securing the repayment of it to the Plaintiff; that those bonds were among the securities of the Plaintiff which *Skyrme* had deposited with the bank, and that the bank had given them up to *Partridge* without the Plaintiff's authority, and without her ever having received the money due on them. The relief asked was modified as follows: Instead of a general account, an account was asked only of the money or other consideration paid or given to the bank for the delivery up of the bonds to *Partridge;* and the prayer for damages was "for damages sustained by reason of giving up the bonds, and of the wrongful acts of the said company in opening the said accounts and otherwise."

The Defendant, on the 18th of March, 1878, applied by summons for leave to demur as well as plead to such part of the amended statement of claim as asked an injunction and as asked damages by reason of the alleged wrongful acts of the company. This application was refused. The Defendant, however, having obtained an order to amend his statement of defence, delivered a demurrer and amended statement of defence, by which he demurred, 1, "to so much of the amended statement of claim as seeks an injunction to restrain the Defendant and the above-named company from enforcing the award in the amended statement of claim in that behalf mentioned, by execution or otherwise, until the bonds, deeds, and documents therein also mentioned shall have been given up;" the ground of demurrer alleged being that the award appeared from the statement of claim to be a proceeding in another Division of the High Court of Justice which could

not be restrained by injunction; and, 2, "to such part of the amended statement of claim as claims or seeks to recover damages alleged to have been sustained by reason of the alleged wrongful acts of the company in opening the accounts or alleged accounts therein in that behalf referred to, and otherwise;" the ground of demurrer alleged being that it did not appear by the amended statement of claim that the company had done any wrongful act (or, at all events, any wrongful act other than and besides the giving up of the bonds therein particularly mentioned, if such act were wrongful, which the Defendant did not admit), or any other act other than as aforesaid constituting a legal wrong, that would support an action. The demurrer was heard before Vice-Chancellor *Malins* on the 2nd of May, 1878.

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J. Pearson, Q.C., and *Ingle Joyce*, for the demurrer.

Glasse, Q.C., and *Colt, contrà*, were not called upon.

MALINS, V.C.:—

I must order the benefit of this demurrer to be reserved to the hearing. I think the Court ought to discourage demurrers to parts of statements of claim where the whole matter ought to be disposed of, and so multiplying the hearings, instead of diminishing them by having the case disposed of once for all. Nothing can be more inconvenient and more detrimental to the administration of justice than multiplying proceedings by demurring to part of the relief prayed by the claim. First, I am told that the Defendant demurs to the 3rd paragraph of the prayer, then it turns out that he only demurs to the latter part of that paragraph, and then to part of the 4th paragraph. I wish it to be known that I entirely set my face against such a practice; and I hope it will be made known to the profession that parties who take that course, if they come before me, will probably have to pay the costs of it.

Judgment, V.-C. M.

The Defendant appealed. The appeal came on to be heard on the 29th of May.

C. A.

J. Pearson, Q.C., and *Ingle Joyce*, for the Appellant:—

Argument.

The demurrer ought to have been allowed, and not reserved to

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the hearing. There is no power to restrain the proceedings on the award in the Queen's Bench Division: *Judicature Act*, 1873, s. 24, r. 5. Then we demur to the relief on the merits. The whole case has been gone into before the arbitrator, and been decided upon. It is manifest that the Plaintiff has suffered no damages from the opening of the account, but has received a benefit, for she has obtained the benefit of *Skyrme's* payments, which have reduced her liability by two-thirds.

Glasse, Q.C., and *Colt*, for the Plaintiff:—

A defence was put in to the statement of claim without any demurrer. Then the statement of claim was amended, not making a new case, and the Defendant demurs. That is not admissible: *Attorney-General* v. *Cooper* (1).

[JESSEL, M.R.:—That was the old practice, and was a branch of the rule that an answer overruled a demurrer. That rule is not now in force.]

Then we say the Defendant was irregular in demurring under an order to amend his statement of defence.

[JESSEL, M.R.:—I do not know of any rule against his doing so.]

Then as to the form of the demurrer. Order XXVIII., rule 1, of Rules of Court, 1875, gives leave only to demur to a part of a pleading setting up a separate cause of action; and form 28 in Sched. C. to the *Judicature Act*, 1873, contemplates the pointing out the paragraphs containing the allegations demurred to, otherwise the Plaintiff cannot tell what is to be taken as struck out under Order XXVIII., rule 10, if the demurrer is allowed. There is a right to damages for the detention of the deeds, which comes in under the words "or otherwise," and the demurrer as to damages cannot be allowed.

Judgment, C. A. Jessel, M.R. —

JESSEL, M.R.:—

I think that this demurrer ought to have been allowed. It is a question of fair substance that we have to look at. It was said that a party could not demur in this way, but I can see no reason why he should not. A substantial part of the action is demurred to, the Defendant saying that there is no cause of action

(1) 8 Hare, 166.

as to two things in respect of which separate relief is claimed, and upon separate allegations.

First of all the Plaintiff says that the Defendants brought an action at law for the recovery of an item of £1650; the Plaintiff pleaded, and when the action came on for trial it was at the last moment, under great pressure, referred to arbitration. The arbitrator, on the 29th of May, 1876, made an award against the Plaintiff for £500 5*s.* 8*d.* and costs. That was an award in an action not pending in this Division. The Plaintiff now asks for an injunction to restrain the banking company from enforcing the award, by execution or otherwise, until some deeds and documents are delivered over. The answer is that this is a proceeding pending in another Division of the High Court of Justice. Of course the award in an action can be enforced by entering up judgment in the Division in which the action is brought, and by issuing execution on that judgment. Now, if a Defendant, in such a case has anything to complain of, it must either be something which he could have alleged by way of defence to the action, or it must be something which he could not have so alleged, because it came to his knowledge after the award was made. If it is in the first category, he should have pleaded to the action; if it is in the second, he should have made a motion in the Division of the High Court to which the action belongs to stay proceedings in the action, either wholly or partially, according to the remedy to which he has discovered himself to have become entitled. But in no way and under no circumstances can a Judge of another Division interfere at all as regards that action by way of injunction to restrain proceedings in it, and therefore the demurrer appears to me as to this part of the case to be well founded.

The other part of the case passes my comprehension. It relates to the damages claimed for opening an account in a lady's name by a solicitor named *Skyrme,* who is alleged to have committed a fraud upon her, to have forged her name, and to have opened the account without her authority. It appears he induced the lady, who is the Plaintiff, to sign a cheque for £1650, which was duly honoured by the bank, and the bank brought an action in respect of the money they had paid on the cheque, which was actually signed by her. That was referred to arbitration, and before the

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arbitrator the lady got the benefit of an amount standing to her credit in the books of the bank in the account opened without her authority, and thereby the damages were reduced to this sum of £500 5*s.* 8*d.* How the opening of the account, the ultimate effect of which was to relieve the Plaintiff of upwards of £1100 out of the £1650, could be made a ground for maintaining an action for damages against the Defendants, as I said before, I for one do not understand. It appears to me that the demurrer on this ground ought also to be allowed.

Then comes another small ground of argument on the demurrer to which I will shortly refer. The Defendants have demurred to the claim for damages for opening of the account "and otherwise," not demurring to the damages asked for for giving up the bonds. The answer made is, that if you scan this long statement of seventeen printed pages very narrowly you will find it alleged that some seventeen years ago the solicitor of the Plaintiff got possession of deeds belonging to her which were deposited with the bank without her authority, that they were asked to give them up, and that they did not do it, and then it is said they alleged they had a claim upon them. Then it is said that for this detention of the deeds the Plaintiff, though she has not alleged any damage, would possibly get a farthing, or some nominal damages under the words "and otherwise." But it appears to me that defendants are not bound to scan pleadings in this way. There are two distinct grounds alleged, one for delivering up the bonds to Mr. *Partridge*, and the other is the opening of the account, as to both of which the Plaintiff alleges she has sustained damage. It does not appear to me that when a plaintiff puts that forward as having been the ground on which she claims damage, a defendant is bound to look through a long statement of claim like this, containing many immaterial allegations, in order to discover whether something else which will support a claim for nominal damages is to be found in it. I think that if a plaintiff were allowed to avail himself of this kind of suggestion in order to defeat a demurrer, it would simply be a trap for the opposite party.

It seems to me, therefore, that the right course to take is to allow the demurrer as it stands, without reserving any right to the Plaintiff under the words "and otherwise."

BRAMWELL, L.J.:—

I am of the same opinion; and, without again going over the ground covered by the observations of the Master of the Rolls, I will merely say this. In the first place, I do not at all share Mr. *Glasse's* difficulty. It seems to me it was intended by the Act, whenever there was a new statement of claim filed and a different case made for the Defendant to answer, that he is as much at liberty to demur as he was before. As to the subsequent claim for an injunction, it seems so me that the Defendant is clearly right. This action would be maintainable in the Queen's Bench Division, the Chancery Division having now no exclusive jurisdiction over a matter of this kind, and it certainly would have been a curious thing for an action to be brought in the Queen's Bench Division for an injunction to restrain the Defendant from enforcing his judgment in another Division. Then there is this strange thing also. The prayer is for an injunction to restrain the Defendant from enforcing the award by execution or otherwise until the bonds, deeds, or documents shall have been given up. What connection have the two things with each other? Here is a judgment which the statement of claim supposes to be valid and enforceable, but because the Plaintiff says she has some other claim against the Defendant the Defendant is to be enjoined from enforcing that judgment.

Then as to the other point, it is perfectly manifest that the opening of the account was unauthorized according to the statement of claim, and, therefore, if any damage had resulted to the Plaintiff from it that would have been a cause of action. But it is manifest not only that no damage resulted to her from it, but that a good resulted to her from it, because she drew this cheque for £1650, and if, as she stated, she had no assets in the hands of the Defendants at all, it was really a request by her to them to pay for her accommodation the amount of £1650, and but for the account having been opened she would have had to repay it in full. As to the statement that that amount had been abstracted from the account, that is true; but it was abstracted by the same man who had fed it, and taking his abstractions and his feedings together, it is clear that it was a benefit to her.

Then with regard to the words "and otherwise," the claim is in

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fact for damages sustained by reason of opening the said account "and for damages otherwise sustained by the Plaintiff," not in any way identifying them so that the Defendant could know how to address himself to them. I should think that upon this statement of claim, taking it to be true, as we are bound to do upon this demurrer, there is matter shewn which would entitle the Plaintiff to damages for an actionable detention of deeds, but I think that the demurrer ought not to be held to be bad on the ground that those words "and otherwise," the meaning of which is indistinct, and which are not at all identified, might cover a claim for nominal damages.

James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion.

Solicitors: *Cooke & Jonas; Thomas Fortune.*

C. A. 1878 *June* 7.

LEACH *v.* JAY.

[1877 L. 40.]

Will—Construction—"Die seised"—Wrongful Possession by Strangers.

R., being seised of freehold houses, died intestate in 1864, leaving *A.* his sole heiress-at-law. Upon *R.'s* death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. *A.* died in 1871, without ever having entered into possession of the property, having devised to *L.* all real estate (if any) of which she might die seised.

An action having been brought by *L.* against the devisees of *R.'s* widow for recovery of the land:—

Held, on demurrer (affirming the decision of *Jessel*, M.R.), that "seised," being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as *A.* at the time of her death had no seisin at law or in fact, the property did not pass under her devise.

Statement.

THIS was an appeal from a decision of the Master of the Rolls (1).

(1) 6 Ch. D. 496.

Statement.

The statement of claim alleged as follows:—

Robert Roberts died in 1864 intestate as to his real estates, leaving *Anne Roberts* his sole heiress-at-law, and thereupon his real estates descended to and became vested in *Anne Roberts* as such heiress-at-law, and remained so vested, and she had seisin in law thereof at the time of her death.

The said *R. Roberts* was at the time of his death seised of certain freehold houses at *Brighton*, a freehold house at *E.*, in the county of *Surrey*, then or late in the occupation of *W.*, and two freehold houses at *L.*, in the said county of *Surrey*, then or late in the occupation of *E.* and another.

Upon the death of *R. Roberts*, his widow, *Mary Roberts*, under colour of a pretended will of her husband in her favour, entered into possession of the said real estates, and retained possession of them until her death in 1869, whereupon her devisees, the Defendants, entered into possession of them.

Anne Roberts died in 1871, having by her will, dated in 1870, after giving her residuary personal estate to the Plaintiff, *John Leach*, devised as follows: "I also bequeath and devise to him" (the Plaintiff) "all real estate (if any) of which I may die seised."

The Defendants having refused to deliver up possession of the houses to the Plaintiff, or to recognise his title thereto as *Anne Roberts'* devisee, he brought this action, claiming to have his title established, and to recover possession, with consequential relief.

The several Defendants demurred to the statement of claim on the ground that *Anne Roberts'* will did not, under the circumstances alleged in the statement of claim, pass the property or any right of entry thereon to the Plaintiff, or, in other words, that *Anne Roberts* was not seised of the property at the time of her death.

The Master of the Rolls allowed the demurrer, and from this decision the Plaintiff appealed.

Argument.

Davey, Q.C., and *H. A. Giffard*, for the Appellant:—

Even if the word "seisin" is construed technically, *Anne Roberts* was "seised" of the land. Although she was not seised in deed she was so in law. The distinction between seisin in law and in deed is maintained in all the text writers, and the mere

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fact of wrongful possession by a stranger is not enough to destroy the seisin in law. *Cruise's* Digest (1); *Watkins* on Descent (2); *Mozley* and *Whiteley's* Law Dictionary, "Seisin"; *Jacob's* Law Dictionary, "Seisin"; *Williams* on "Seisin" (3); *Co. Litt.* (4). But it is unreasonable in the present day to confine the word "seisin" when used in a will to its technical sense. The legal incidents of "seisin" are obsolete; an absolute right to the legal freehold is all that is now regarded by the law: 3 & 4 Will. 4, c. 27, s. 39; 3 & 4 Will. 4, c. 106; 1 Vict. c. 26, s. 2; *Taylor* v. *Horde* (5). The testatrix probably did not know the technical meaning of the word, and therefore could not have meant to use it in its technical sense.

Cookson, Q.C., *Chitty*, Q.C., *Ince*, Q.C., *Hadley*, *Byrne*, and *Borrett*, for the several Defendants, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I do not think we can differ from the Master of the Rolls in this case. This lady, for some reason or motive of her own, or for no reason, chose to use one of the most technical words in our law. The word has acquired no other meaning than its technical meaning, it has never got into ordinary use; therefore we are not at liberty to attribute to it any other meaning merely because we suppose that the testatrix did not know the true meaning of the word. It has been argued in favour of the Appellant that seisin now has lost its distinctive meaning, that all its consequences have long ceased to exist, and therefore that you cannot predicate of anything that a testator died seised of it in any other sense than that it was part of his real estate. I am of opinion that there are such things as seisin and disseisin still. Mr. *Joshua Williams* says in his late book on Seisin (6): "If a person wrongfully gets possession of the land of another he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if a squatter wrongfully encloses a bit of waste land and builds a hut on it and lives there, he acquires an estate

(1) Tit. I, sect. 20.
(2) 4th Ed. p. 43.
(3) Page 5.
(4) 29 a, 266 b, 358 b.
(5) 2 Sm. L. C. 7th Ed. p. 584.
(6) Page 7.

in fee simple by his own wrong in the land which he has enclosed. He is seised, and the owner of the waste is disseised. It is true that, until by length of time the *Statute of Limitations* shall have confirmed his title, he may be turned out by legal process. But as long as he remains he is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner in the meantime has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised another person cannot be so." Upon the allegations in this statement of claim, it appears to me that *Mary Roberts* was in the position of the squatter in Mr. *Williams'* book, that she squatted on the land, and that she and her heirs acquired an estate in fee by wrong which in time might eventually be turned into a rightful estate. She was seised, and as no one can be seised and disseised at the same time, the testatrix was not at the time of her death seised of the land in question. The appeal must therefore be dismissed with costs.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am of the same opinion.

BRAMWELL, L.J.:—

Bramwell, L.J.

I also am of the same opinion. I will only add one observation with respect to an argument of Mr. *Davey* which impressed me. He said that in all probability the testatrix did not know the technical meaning of the word seisin, and that the Court ought not to attribute to her a meaning which she did not herself attach to it. But we must attach some meaning to the word, and if we are not to take the proper meaning, but some other meaning, what other meaning is it to be? If we are to guess at the meaning which the testatrix attached to the word, where are we to stop? Therefore it seems to me that the word must either be meaningless, or else must have its proper technical meaning.

Solicitors: *Paterson, Snow, & Bloxam,* agents for *R. A. White, Grantham; White, Borrett, & Co.,* agents for *Taylor & Newborn, Epworth; F. F. Smallpeice,* agent for *Smallpeice & Sons, Guildford.*

C. A. 1878 July 17, 24.

ATTORNEY-GENERAL *v.* SWANSEA IMPROVEMENTS AND TRAMWAYS COMPANY.

[1878 A. 38.]

Practice—Staying Proceedings pending Appeal—Jurisdiction of Court of Appeal—Rules of Court, 1875, *Order* LVIII., *rr.* 16, 17.

An application to the Court of Appeal, under Rules of Court, 1875, Order LVIII., rules 16 and 17, to stay the proceedings under a judgment pending an appeal to that Court, inasmuch as it cannot be made until after an application has been made to the Court of first instance, is not an original motion, but a motion by way of appeal, though it need not be formally entered as an appeal.

Observations of *Mellish*, L.J., in *Cooper* v. *Cooper* (1) explained.

Statement.

ON the trial of this action by Vice-Chancellor *Hall* on the 18th of June, 1878, it was ordered that an injunction should be awarded to restrain the Defendants from using on their tramways any locomotive engine driven by steam power. And it was ordered that the injunction should not be enforced until after the 18th of July, 1878. On the 28th of June, 1878, the Defendants served notice of appeal from this judgment. On the 11th of July the Defendants moved before the Vice-Chancellor to stay the proceedings under the judgment pending the appeal. The Vice-Chancellor ordered the motion to stand over for a week to await the result of an application to the Court of Appeal to advance the hearing of the appeal. The Defendants now applied to the Court of Appeal by original motion that the hearing of the appeal might be advanced, and that the injunction might be suspended, and all further proceedings under the judgment stayed, until one month after the appeal should have been disposed of.

Argument.

Dickinson, Q.C., and *Bradford*, for the Defendants:—

The case is one in which the hearing of the appeal ought to be advanced. If the Court will not do this, it can direct a stay of proceedings pending the appeal. Though rule 17 of Order LVIII. of Rules of Court, 1875, says that the application must be made first to the Court below, yet in *Cooper* v. *Cooper* (1) Lord Justice

(1) 2 Ch. D. 492.

Mellish said that such a motion before the Court of Appeal is not an appeal, but is really an original motion.

C. A. 1878

ATTORNEY-GENERAL *v.* SWANSEA IMPROVEMENTS AND TRAMWAYS COMPANY.

W. Pearson, Q.C., and *Badcock*, for the Relator, were not heard.

JESSEL, M.R.:—

Judgment, Jessel, M.R.

We cannot accede to the application to advance the appeal. The rest of the motion must stand over to await the result of the application to the Vice-Chancellor to stay the proceedings. Probably what Lord Justice *Mellish* meant was that the motion might be heard without being formally set down as an appeal. It must necessarily be a motion by way of appeal, for this Court and the Court below cannot have co-ordinate jurisdiction. You need not give a fresh notice of motion in this Court.

24 Ch D 309
311

BRETT, and COTTON, L.JJ., concurred.

Brett and Cotton, L.JJ.

July 24. The motion was again in the paper for hearing.

Dickinson, Q.C., and *Badcock*, for the Defendants, stated that the Vice-Chancellor had, on the 18th of July, made an order staying the proceedings pending the appeal.

The motion was accordingly withdrawn, the Defendants paying the costs.

Solicitor for Defendants: *Walter Webb.*
Solicitors for Relator: *Crowder, Anstie, & Vizard.*

M. R.

1878

Feb. 5, 6.

FREARSON *v.* LOE.

[1876 F. 134.]

Patent—Validity—Novelty—Partial Anticipation of Invention—Threatened Infringement—Imitation for Purpose of Experiment—Injunction.

A specification is not invalid by reason of its describing an invention part of which was not new at the date of the patent, if, after eliminating what was old, a residue is left of sufficient utility, in which case the residue, if properly claimed, will be a proper subject-matter for the grant of letters patent.

A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place.

When articles which are the subject of a patent are made without a license from the patentee simply for the purpose of *bonâ fide* experiments, those who so make them are not necessarily liable to an action, but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights, and will be restrained by injunction.

Statement.

THIS was an action to restrain the alleged infringement by the Defendant of certain letters patent granted to the Plaintiff.

By letters patent under the Great Seal (No. 1971 of the series for the year 1870), dated the 12th of July, 1870, Her Majesty granted to the Plaintiff the sole use within the *United Kingdom*, for the term of fourteen years, of an invention of "improvements in screws and screw-drivers and in machinery for the manufacture of screws," as the same was described in the specification thereof, subject to the condition as to filing a specification within six months next after the date of the letters patent.

On the 11th of January, 1870, the Plaintiff, in performance of the condition, filed a specification describing the nature of the invention, which, so far as material, was as follows (the paragraphs being numbered for convenience of reference):—

1. "My improvements in screws consist, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the said nick may be of great depth at the centre of the head, and terminate within the edge of the head; or the deep nick terminating within the edge of the head

may be made of other figure than a circular one. By thus making the nick so that it does not extend all across the head the tendency of the head of the screw to burst under the action of the screw-driver is prevented or diminished, and the injury to which an article is exposed during the driving of the screw by the screw-driver protruding from the head of the nick is avoided. I make the said nicks in the heads of screws in various ways. They may be made by circular saws of small diameter, or by cutters, or by means of a suitably shaped punch or pressing tool worked in the machine by which the heading of the blanks is effected. In screws made by casting the said nicks may be made by the casting process.

2. "My improvements in screws consist, secondly, in making two or more nicks of the kind described in the head of the screw. When two nicks are made they cross each other at right angles at the centre of the head. When three nicks are made they cross each other at the centre of the head, each nick making with the adjacent one an angle of about sixty degrees. I prefer in all cases where more than one nick is made that the nicks cross each other so that the circle shall be equally divided by the said nicks. These crossing nicks may be made by sawing, cutting, pressing, or casting.

3. "My improvements in screw-drivers consist in making the end or acting part of the screw-driver of the form of the nick or nicks hereinbefore described in the head of the screw. For screws with two or more nicks crossing one another, I prefer to make the screw-driver from iron or steel, grooved or fluted, so as to have the figure proper to make it fit into the said crossing nicks.

4. "Screw-drivers made according to my invention, used with screws made according to my invention, have the advantage that, when introduced into the nick or nicks of the screw and pressure is applied to them, the end or acting part takes at once its proper axial position with regard to the screw, and the force used for screwing and unscrewing the said screw is applied in the most advantageous manner."

The specification then described (paragraph 5) the Plaintiff's improvements in machinery, consisting of certain arrangements or

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FREARSON v. LOE.

Statement.

combinations of parts for forming the nicks before described in the heads of screws, and proceeded as follows:—

6. "Having explained the nature of my invention, I will proceed to describe with reference to the accompanying drawing the manner in which the same is to be performed.

7. "Figure 1 represents in plan, and figure 2 in vertical section, the head of a screw provided with a curved nick according to my invention. The said nick is made of a curve of short radius, the greatest depth of the said nick being in the centre of the head, the ends of the nick terminating within the edge of the head.

8. "Figure 3 represents in plan, and figure 4 in section, the head of a screw in which two nicks of the kind represented in figures 1 and 2 are employed, the said nicks being situated at right angles and crossing one another at the centre of the head.

9. "Figure 5 represents in plan, and figure 6 in section, the head of a screw provided with a single nick of the kind represented in figures 1 and 2 in combination with a conical-shaped central recess marked 3.

10. "Figure 7 represents in plan, and figure 8 in section, the head of a screw provided with a double nick in combination with a conical-shaped central recess 3. By means of this central recess 3 great facility in the use of the screw-driver is obtained, as the said recess conducts the said screw-driver at once to the centre of the screw head and from thence to the nick. The said recess also facilitates the manufacture of the nick or nicks.

11. "Figures 9, 10, and 10^{A}, represent in plan, elevation, and section respectively the head of a screw in which the single cross nick is made of an angular figure instead of the curved figure represented in figures 1 and 2, the said angular shaped nick being represented in combination with a conical central recess 3.

12. "Figures 11, 12, 13, 14, 15, and 16 represent other forms of nicks made according to my invention. In these forms of my invention the single or compound nicks in the heads besides being angular have their sides inclined to one another or of a V shape, the narrowest part of the V nicks being in the centre of the head where the several nicks meet, as will be understood by an examination of the drawing. In figures 11 and 12 a central recess is represented combined with a V-shaped nick. The advantage of

FIG. 17

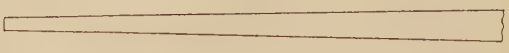


FIG. 18.

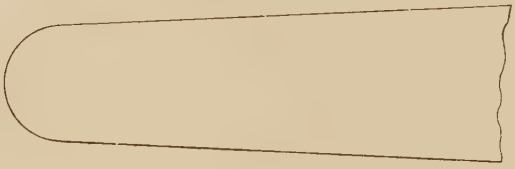


FIG. 1.

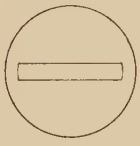


FIG. 2.

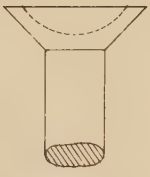


FIG. 9.

FIG. 10.

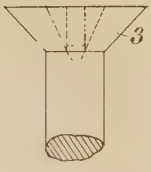


FIG. 10A

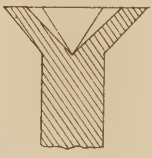


FIG. 3.

FIG. 4.

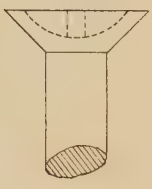


FIG. 11.

FIG. 12.

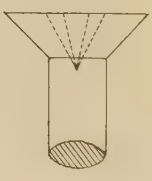


FIG. 21.

FIG. 22.

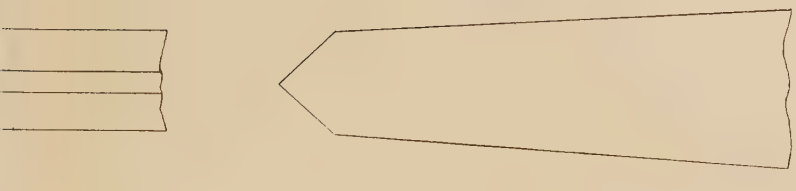


FIG. 5.

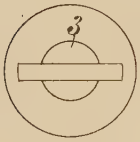


FIG. 7.

FIG. 6.

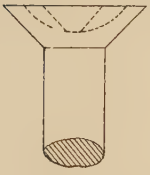


FIG. 8.

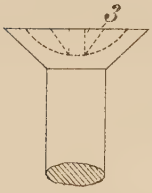


FIG. 13.

FIG. 15.

FIG. 14.

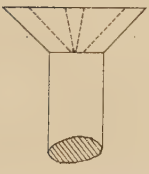
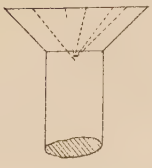


FIG. 16.



the V-shaped angular nicks over curved nicks is that one screw-driver will suit all sizes of screws.

13. "It is well known to persons who use screws that if the nicks are narrow and shallow it is difficult to drive the screw without the screw-driver slipping out of the nick, and, if the nicks are wide and deep to afford a good grip, the head of the screw is weakened and the screw-driver is liable to slip out sideways and deface the finished surface of the work, and if the screw-driver is the same width as or wider than the head of the screw the countersunk work is liable to be defaced and the angles of the screw-driver are often broken.

14. "By the use of screws and screw-drivers constructed according to my invention these inconveniences are prevented or diminished. The improved nicks being much deeper in the centre than the ends the screw-driver takes a firmer grip of the screw than with nicks of the ordinary kind. The screw-driver is also kept central, and if but slightly pressed it cannot slip out of the nick or deface the work. As the nicks of screws made according to my invention can be made much wider than those of the ordinary screws without weakening the heads a stronger screw-driver may be used and the liability of the screw-drivers to break thus diminished.

15. "Figure 17 represents in edge view and figure 18 in front elevation the acting end of a screw-driver constructed according to my invention to be used with screws having nicks of the forms represented in figures 1, 2, 3, 4, 5, and 6.

16. "Figure 21 represents in edge view and figure 22 in front elevation the acting end of a screw-driver constructed according to my invention to be used with screws having nicks of the forms represented in figures 9, 10, 11, 12, 13, and 14.

17. "Figure 19 represents in end elevation and figure 20 in side elevation the acting end of a screw-driver constructed according to my invention, the said screw-driver having three branches to fit it to be used with screws having nicks of the kind represented in figures 15 and 16. The screw-driver, figures 19 and 20, may be made from long rods shaped by rolling, the said rods being cut into suitable lengths and their ends shaped to fit the nicks of the screw heads."

M. R. 1878 FREARSON v. LOE. Statement.

18. The specification then described with reference to the drawing the Plaintiff's improvements in machinery and tools for forming the several kinds of nicks thereinbefore described, and continued as follows:—

19. "Having now described the nature of my invention, and the manner in which the same is to be performed, I wish it to be understood that I do not limit myself to the precise details herein described and illustrated, as the same may be varied without departing from the nature of my invention; but I claim as my invention of improvements in screws and screw-drivers, and in machinery for the manufacture of screws,—

"Firstly. Making one or more curved nicks in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head, substantially as and for the purpose hereinbefore described and illustrated in figures 1 to 8, both inclusive, of the accompanying drawing.

"Secondly. Making one or more nicks of an angular figure or of a combined angular and V figure in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head, substantially as and for the purpose hereinbefore described and illustrated in figures 9 to 16, both inclusive, of the accompanying drawing.

Thirdly. Making a conical recess in the centre of the heads of screws, substantially as and for the purpose hereinbefore described and illustrated in figures 5, 6, 7, 8, 9, 10, 11, and 12 of the accompanying drawing.

"Fourthly. Constructing screw-drivers to be used with the screws enumerated in the previous claims, substantially as hereinbefore described and illustrated in figures 17 to 22, both inclusive, of the accompanying drawing.

"Fifthly. The combinations or arrangements of parts hereinbefore described and illustrated in figures 23, 24, 25, and 26 of the accompanying drawing for supporting and steadying the saw and saw shaft of machinery to be employed in cutting curved nicks in the heads of screws.

"Sixthly. The combination or arrangement of the parts of machinery hereinbefore described and illustrated in figures 27,

28, 29, and 30 of the accompanying drawing, for cutting angular nicks in the heads of screws.

"Lastly. The construction of the punches hereinbefore described and illustrated in figures 31 to 36, both inclusive, of the accompanying drawing, and similarly constructed punches for punching V-shaped nicks in the heads of screws."

By letters patent under the Great Seal (No. 2005 of the series for 1875), dated the 1st of June, 1875, Her Majesty granted to the Plaintiff the sole privilege to make and use within the *United Kingdom*, for the term of fourteen years, an invention of "improvements in the manufacture of certain kinds of screws, and in tools and machinery to be used in the manufacture, as the same was described in the specification thereof, subject to the usual condition as to filing a specification.

On the 27th of November, 1875, the Plaintiff, in performance of the condition, filed a specification describing the nature of the invention.

On the 19th of October, 1876, the Plaintiff issued his writ, and subsequently delivered his statement of claim.

The Plaintiff alleged that the said letters patent of the 12th of July, 1870, and the 1st of June, 1875, respectively, were valid, and the improvements thereby respectively protected were novel, useful, and valuable.

The Plaintiff alleged that the Defendants had since September, 1876, manufactured machinery or tools, and had manufactured or sold screws or screw-drivers according to or only colourably differing from those which were the subjects of the inventions comprised in the letters patent to the damage of the Plaintiff, and threatened to continue the use of the machinery or tools, and the manufacture or sale of screws and screw-drivers as before mentioned; and claimed, first, damages for the injuries complained of; secondly, that the Defendants might be restrained by injunction from manufacturing or using machinery or tools, and from manufacturing or selling screws or screw-drivers, according to or only colourably differing from the inventions comprised in the letters patent.

The Defendant *William Clark Loe*, on the 27th of February, 1877, delivered his original statement of defence and counter-

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claim, and thereby claimed that he was entitled to use the said machinery and to manufacture therewith screws and screw-drivers, and said that it was his intention to do so if and as soon as he was able to perfect the said machinery so that he could manufacture the same at a profit. He further set up an agreement of the 10th of August, 1873, whereby he alleged that the Plaintiff agreed to sell to him (*W. C. Loe*) and others all the Plaintiff's interest in the said letters patent of the 12th of July, 1870, and in any subsequent letters patent for perfecting the said machinery for the price named, which agreement the Plaintiff had refused to sign. He further alleged that he had advanced various sums of money to the Plaintiff for the purpose of experiments with the said machinery, which the Plaintiff had not accounted for; and he claimed by way of counter-claim that the Plaintiff might be ordered to repay the said sums, or specifically to perform the said agreement; also that the Plaintiff might be restrained from manufacturing or using machinery, or tools, or screws, or screw-drivers according to or only colourably differing from the inventions comprised in the letters patent.

An application was made by the Plaintiff to strike out the said counter-claim as embarrassing, and it was agreed that it should be struck out, with liberty to amend the statement of defence.

On the 3rd of May, 1878, the Defendant *Loe* delivered his amended statement of defence, in which his former claim was abandoned; he denied that the Plaintiff was the true inventor of either of the alleged inventions; he alleged that neither of them was novel, useful, or valuable, or such as by law could be made the proper subject-matter of a patent; and alleged that he was not infringing and never had infringed the Plaintiff's alleged patents, or either of them.

The Defendant *Jabez James*, besides denying the novelty of the alleged inventions, alleged as a further ground of defence that a machine which he had manufactured, which was an alleged infringement of the letters patent of September, 1875, was made from the tracings of drawings prepared under the joint superintendence of the Defendant *Loe* and the Plaintiff.

Among other specifications relied on as anticipations of the Plaintiff's alleged invention was that filed by *A. E. Newton* on the

27th of August, 1867, under letters patent of the 27th of February, 1867, which contained the following passages :—

"When screws or bolts are constructed in the ordinary manner (that is to say) with slotted heads, it has been found in practice that if the slot is made shallow the screw-driver will not have sufficient hold to drive the screw or bolt home, and by slipping and getting out of the slot it will soon so wear off the shoulders of the slot as to make it nearly impossible to move the screw either out or in, and that if on the other hand the slot is made deep there is a liability of breaking off one half of the head, rendering necessary a considerable expenditure of time and patience in removing the screw. These difficulties occur specially when it is necessary that the screws or bolts should be driven hard so as to have a firm hold.

"Now the object of the present invention is to obviate these difficulties, and to this end the invention consists in forming screws or bolts with a central hole in the head end (instead of the nick heretofore used) to receive a driver in the form of a plug which takes better hold for turning the screw."

The specification then contained a description of the figures, and added: "The lower end or part of the driver which enters the perforation is by preference made square, but this shape is not absolutely necessary, and any other shape, even a round driver can be used; the square form will however bite more firmly on the sides of the perforation."

"It will be observed that the perforations in the screws or bolts are slghtly tapered, that is to say, they are a little narrower at the bottom than they are at the top, to give the driver a better hold upon the inner surface of the perforation, and to compensate for any wear in the perforation or of the driver, that being the preferred form, to which, however, I do not intend to limit my claim of invention, as other forms will answer the purpose.

"Having now set forth the nature of the invention of 'An Improvement in Screws and Bolts' as communicated to me from abroad, and explained the manner of carrying the same into effect, I wish it to be understood that under the above in part recited letters patent I claim, as a new manufacture, a wood screw, screw-bolt, or other equivalent screw with a central hole to receive a plug as a driver, substantially as and for the purpose described."

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Argument.

The action now came on for trial, and evidence was gone into.

Aston, Q.C., and *Macrory*, for the Plaintiff.

Chitty, Q.C., and *Northmore Lawrence*, for the Defendant *Loe*:—

The Plaintiff's patent of 1870 is invalid. At the commencement of his specification he says: "My improvements in screws consist, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the said nick may be of great depth at the centre of the head and terminate within the edge of the head; or the deep nick terminating within the edge of the head may be made of other figure than a circular one." These words are sufficient to include a nick of any figure whatever. Then, when the first part of the claim is examined, we read, "Making one or more curved nicks in the heads of screws, the said nick or nicks being of the greatest depth at the centre of the head, and terminating within the edge of the head." There is no novelty in the screw here described; and, according to the fair meaning of the specification, the invention has, as we contend, been anticipated by previous inventors. The V-shaped nick referred to in the specification and in the second claim was not new, and any kind of screw-driver could be applied to it.

There are several screws which anticipated the Plaintiff's invention, especially the one known as "*Drane's Screw*," which was an anticipation of the first claim; an old kind of screw belonging to a can; the screw of *Jabez James*; and one other. At any rate, the Plaintiff's V screw was anticipated by *Newton's* patent of 1867.

Even supposing the screws of *Drane* and *Jabez James* should not be held to be anticipations of the whole of the Plaintiff's specification, they anticipated it in substance, nothing of real value being left; and where the main and most material part of a specification fails, the patent fails altogether.

Further, we contend that there has been no actual infringement. There is no case in which a patentee has succeeded in maintaining an action for injunction on a mere threat of infringement.

The Defendant does not deny that a small quantity of screw

blanks were made according to the two patents of 1870 and 1875, but that was merely for the purpose of experiment, and not for the purpose of sale. This would give the Plaintiff no right of relief. The machine also was only made for experimental purposes. Manufacture for the purpose of experiment is not an infringement: *Jones* v. *Pearce* (1); *Higgs* v. *Goodwin* (2); *Muntz* v. *Foster* (3).

Davey, Q.C., and *Lawson*, for the Defendant *James*, against whom the action was dismissed.

Judgment.

JESSEL, M.R., after adverting to the facts of the case, which involved a conflict of evidence of a somewhat unusual character, continued:—

There are two patents claimed by the Plaintiff. The first is the patent of 1870, as to which it is not denied that he was the inventor of the invention described in the specification. But the Defendant denies the validity of the patent on various grounds, and he also denies that he has infringed that patent. I will now examine the grounds of invalidity which he sets up.

It is said that the specification of the patent of 1870 is to be read in a particular way, and that, if so read, it has been anticipated. The first thing is to see what it means, and then I think there will be no difficulty in dealing with the alleged anticipation. That patent is for an improvement in the manufacture of screw-heads and screw-drivers, but the point I have chiefly to consider refers to screw-heads. In paragraph 1 of the specification, the Plaintiff says, "My improvements in screws consist, first, in making the slit or groove in the head of the screw, commonly called the nick, of a curve of short radius, so that the nick may be of great depth at the centre of the head, and terminate within the edge of the head; or the deep nick terminating within the edge of the head may be made of other figure than a circular one."

If the matter had stopped there, I do not think that the words "curve of short radius" are other than a description of the circular

(1) 1 Webs. P. R. 122. (2) E. B. & F. 529.
(3) 2 Webs. P. R. 93, 96.

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nick. I do not think any reliance can be placed on those words, and if the matter had stopped there the nick might have been made of any length; but he goes on, "By thus making the nick so that it does not extend all across the head, the tendency of the head of the screw to burst under the action of the screw-driver is prevented or diminished, and the injury to which an article is exposed during the driving of the screw by the screw-driver protruding from the end of the nick is avoided." Now, all that, as it turns out, is not new. It is quite plain that screws were known years before in which the nick did not extend entirely across the head. He then proceeds: "I make the said nicks in the heads of screws in various ways," and then he says how he makes them. Then afterwards, speaking of his screw-driver (paragraph 4), he says: "Screw-drivers made according to my invention, used with screws made according to my invention, have the advantage that, when introduced into the nick or nicks of the screw, and pressure is applied to them, the end or acting part takes at once its proper axial position with regard to the screw, and the force used for screwing and unscrewing the said screw is applied in the most advantageous manner." That peculiar action or position is again an improvement which he dilates upon as being an improvement as well as the other improvement previously mentioned.

Here, it must be observed that it does not follow that, because an inventor thinks he has invented more than he has in fact, and describes the advantages of his invention, and some of those advantages arise from an old portion of the invention, it may not still be a good patent, provided that the invention as claimed is so limited as to fail to cover the actual thing in use while it covers some of the advantages mentioned; in such a case it may still, no doubt, be a good patent. If it turns out that I can get from the description the benefit described in paragraph 4, without the benefit described in the previous paragraphs, it might still be a good patent.

Then in paragraph 12 he gives another invention, and he now describes a nick in the shape of a V, the narrowest part of the V being the centre of the head where the sides meet. Then he says that the advantage of that is that "one screw-driver will suit all sizes of screws." There we have got a special advantage of the

V-nick described, which, of course, would not cover the circular nicks if they were old, which is the substantial part of the invention. He now takes up the circular nicks in paragraph 14: "The improved nicks being much deeper in the centre than the ends the screw-driver takes a firmer grip of the screw than with nicks of the ordinary kind. The screw-driver is also kept central, and if but slightly pressed it cannot slip out of the nick or deface the work. As the nicks of screws made according to my invention can be made much wider than those of the ordinary screws without weakening the heads, a stronger screw-driver may be used, and the liability of the screw-drivers to break thus diminished." And then he says that the figures represent views of the things described.

Stopping there, although, as is very usual in specifications, the language is open to a very great deal of criticism, I think, when you take the fact stated that the nick is much deeper in the centre than at the ends, that must apply to his curved screw nick (which of course, by being curved, would ordinarily be made deeper at the end), and therefore he intends to say that all his nicks are deeper at the middle than the ends, and that that is an integral part of his invention, because he states what are the advantages of it, and that is shewn by a comparison of the figures. Therefore I think that, even under the claim itself, you have here a description as regards the circular-shaped nick, or the nicks of other than a circular shape, whatever they may be, that they are to be much deeper at the centre than at the ends.

Then, when we come to the claim, we find this. The first claim is as follows:—"Making one or more curved nicks in the heads of screws, the said nick or nicks being of greatest depth at the centre of the head, and terminating within the edge of the head substantially as and for the purpose hereinbefore described and illustrated in figures 1 to 8, both inclusive, of the accompanying drawing." That, I think, again confirms the view I have taken of the passage I have read from paragraph 13, that the nicks in the heads of the screws must be of the greatest depth in the centre and must be curved; or, in other words, though they may be made of any other figure than a circular one, that does not get rid of the curving mentioned in paragraph 1, and, therefore, that part of the

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invention is, as put in the claim, a curved nick of greatest depth at the centre. Therefore, if the curved nick with its greatest depth at the centre is new, and has advantages, it is, I think, a substantive invention, although another kind of nick is mentioned which is not new. What he claims is the combination, and he only claims the curved nick with its greatest depth at the centre of the head. It is manifest that what the Plaintiff claims as the benefit derived from the curved nick arises from the fact of its being of greatest depth at the centre of the head, and that there is really an advantage derived from it.

Then it was stated that the V-shaped nicks were not new, and that you might use any kind of screw-driver for them. Upon the point of anticipation, I will first deal with the screw they call *Drane's* screw. *Drane's* screw was not a screw used for any of these purposes; the great object which *Frearson* had in view was for application to screws to put in wood. That was his main object, but of course his screws might have been used for metal. When you look at *Drane's* screw you see that it is a screw with the head sloped the wrong way, that is, with a head instead of sloping downwards towards the shank of the screw, sloping upwards, and so, instead of making it to sink into the substance, it is made to stand outside, and therefore it could not be used for wood, and was not intended to be used for that purpose. In fact it was used as part of a chuck simply, and for nothing more—not even for ordinary purposes. In the next place, the screw of *Drane* was very much hollowed out in the head, and very peculiarly hollowed out, and of course that would exceedingly weaken the head of the screw if it had been intended for ordinary screwing purposes. I do not see the slightest possible resemblance to the curved screw with the greatest depth in the centre, because it was not a curved nick at all, but a nick with various slots, and the slot was not curved, nor was the depth at the deepest point different from the depth of any other part of the base, it was about as level as could be, and was intended to be made quite level. So that it varied in those two respects from the screw as described in the first claim of *Frearson's* patent of 1870, and varied altogether from the screw described in the second claim. Therefore I do not consider *Drane's* screw in any sense an anticipation of the screw claimed

by the first claim, and in my opinion it was a screw of a different kind, and had not the second set of advantages which are pointed out in *Frearson's* patent.

The next screw that I had pointed out to me was a screw belonging to a can, a very old form of screw, and, when you come to look at it, it does not bear the slightest resemblance to the Plaintiff's except that the hole cut in the top of the screw was a square hole, and did not, like the nick, protrude across the head of the screw. Into that square hole was fitted a short bar, which was put into it, and the screw was turned in that way. It was not curved in any way nor was it deepest in the centre, nor had it any of the second set of advantages pointed out by *Frearson*. It does not appear to me that that is an anticipation.

Then there was shewn to me a third screw, that of *Jabez James*. That was an old form of screw, and there is no doubt that was a genuine screw. That had a single slot across the head, terminating within the edge, and so far like the Plaintiff's screw, one of the many in use at the time, though he does not seem to have known it. Then the sides were not cut parallel, they were slanted a little, like the sides of a chisel or punch, made so for that purpose, so that the screw-driver might not fit tight; the bottom was flat, and was not different in level at any point, either at the centre or anywhere else, from the level of the rest of it. It did not therefore come within the description, nor did it possess the advantages which come within the second set of advantages, which are obvious at once when you put in a semicircular screw-driver to the semicircular bottom of the hole. Therefore that was not an anticipation, except in so far as it was an anticipation of the nick being confined within the edge.

There was only one other screw shewn me. It was not a screw in one sense, as it was not used exactly as a screw, but as a shank on which a nut was to be fastened, but the bottom of the shank was kept in position by something which had a slot in it. But that was also different, because, besides being, like *Drane's*, level at the bottom, it was a shallow and not a deep indentation at all, and not even sloped at the sides. It is not, therefore, in my opinion, an anticipation of the Plaintiff's patent.

I now come to another ground raised by the Defendant. It was

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said that at all events the screw made under *Newton's* patent of 1867 was an anticipation. It was not proved to me that any one ever saw any of those screws made, or that the patent ever came into use at all; but of course there might be sufficient publication even without that, and therefore I have to look at it as a publication. The first remark to be made about *Newton's* specification is this, what he wants to do is to make the slot deeper. He says, "when screws or bolts are constructed in the ordinary manner, that is to say, with slotted heads, it has been found in practice that if the slot is made shallow the screw-driver will not have sufficient hold to drive the screw or bolt home, and by slipping and getting out of the slot it will soon so wear off the shoulders of the slot as to make it nearly impossible to move the screw either out or in, and that if, on the other hand, the slot is made deep there is a liability of breaking off one half of the head, rendering necessary a considerable expenditure of time and patience in removing the screw." Then he is going to get rid of those difficulties, and what does he do? He makes a central hole in the head instead of the nick heretofore used. It is to be observed that the Plaintiff's invention describes it as a nick. You could not, in fact, describe the Plaintiff's as a hole as regards the first part of his invention, though you might very fairly describe it so as regards the second part, that is to say, as regards the V—that might be described as a hole, that is the same idea to this extent, that it is a deep hole like the angular V screw-head. Then he shews his figures, and he says: "The lower end or the part of the driver which enters the perforation is by preference made square, but this shape is not absolutely necessary, and any other shape, even a round driver can be used; the square form will, however, bite more firmly on the sides of the perforation." When you come to look at his sections you find that they agree with that, and that what he is using is in fact a circular hole cut very deep, into which he puts this driver. That is his description of it, and he puts into it either a square or round or angular driver of any shape, but he starts with a round hole. Of course it would not do to use a round driver as an ordinary rule, because the driver would turn round without the screw. I was told that a bar or round driver held at a certain slope would hold from the friction; but that is

not exactly what is claimed by the patent, it is that any shape will do, but not any particular form of round driver. When you come to look at that, you have got a round hole, or something of that sort; but as I said before, that is not at all like the semicircular nick used by the Plaintiff, though it is very like the V, but the distinction is that the mere fact of the sides of the V catching it turns the screw, and in addition to that, the V driver has an advantage which could not be possessed to anything like the same extent by the circular driver, that is, by using the screw-driver for a great variety of screws as regards size. I think it is quite possible that the ordinary round driver as described here might be used for screws of different sizes, and therefore, to some very slight extent, it possessed that advantage, but it would not possess the whole of that advantage, nor anything like it. It appears to me, therefore, that if you take the first part of it, inasmuch as you have a circular hole, it is not an anticipation of *Frearson's* invention, and if you take the second portion for a tapering screw-driver, it is not an anticipation, because it is not the same contrivance, nor has it the same advantages as *Frearson's*. I think, therefore that *Newton's* specification is not a sufficient anticipation.

The last objection taken to *Frearson's* patent was this: It was said, even supposing I should come to the conclusion that *Drane's* and *James'* screws were not an anticipation pure and simple of *Frearson's* specification, yet that they were an anticipation of the substance of it, and that what was left of *Frearson's* was not a sufficient residue to be worthy of a patent, and therefore it must be admitted that, the main part of the patent having been anticipated, the patent fails altogether, and that it must be a serious question whether the residue is sufficient. Now, I agree when you take away the first part of the description the second part is not so remarkable as the first. I do not say it is everything, but you have taken away a very considerable part of it when you shew that making the nicks to terminate within the edge of the screw head is old. Still you must consider that the new portion of the invention is the subject of some invention, and it is very difficult to measure how much invention is required to effect the object aimed at. That is the first consideration, and in the next place you must consider whether there is any advantage

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attending the use of the residue in question, for that is always an important element of consideration. In other words, supposing you strike out of the description so much of it as was anticipated, you have to consider whether there would be still sufficient left, having regard to the advantage to be gained by it. I think there would.

First, you get a firmer grip of the screw by reason of its being deeper in the centre than by nicks of the ordinary kind; that is quite plain, and the moment you slope the screw-driver you see that. Then he says, "It cannot escape out of or deface the work;" that is an important advantage; and then he says, "as they can be made much wider than those of the ordinary screws without weakening the heads, a stronger screw-driver may be used and the liability of the screw-drivers to break be thus diminished." Well, that is an advantage. There are three advantages pointed out; and after all, when you come to consider what a screw-head is, there is not room for much or any considerable amount of ingenuity to be shewn in varying it; and if a man by an improvement of this kind is enabled to make what is a substantial improvement, why should it not be worthy of protection? It is not because he has attempted to claim as an advantage something else to which he is not entitled, that the improvement he has made is to be held not worthy of a patent. I am not to say that, because even half of the advantages said to arise from his invention may not be new, he is not to be protected in respect of the other half. Another advantage referred to consists in enabling a screw-driver of any size to be used for a variety of screws of different sizes; that must be a very great help to the workman. On the whole, in my opinion there has been no anticipation proved of the invention claimed in the Plaintiff's first specification of 1870, and I hold that there is sufficient novelty in it to support the patent.

The next point I have to decide is with reference to the patent of 1875. This patent is in form for a combination substantially constituting a machine for making screws or screw-heads, or screw blanks as they are called. It is a combination for manufacturing the blanks by this complicated, and, I may say, this beautiful machine in combination with certain punches and dies of a peculiar

kind which have been invented for the purpose, but there is nothing to shew that it was an old machine, and although several prior patents were mentioned, that part of the case was not pressed in argument.

I am of opinion, therefore, that there is nothing in those prior patents relied on by the Defendant to anticipate the Plaintiff's. [His Lordship then referred to the conflict of evidence in the case.]

I now come to the next point in the defence, which, after all we have heard, is certainly rather a singular one, namely, that there is no infringement. Now, I am not aware of any suit or action in the Court of Chancery which has been successful on the part of a patentee without infringement having been proved; but in my opinion, on principle, there is no reason why a patentee should not succeed in obtaining an injunction without proving actual infringement. I think so for this reason. Where the Defendant alleges an intention to infringe, and claims the right to infringe, the mischief done by the threatened infringement of the patent is very great, and I see no reason why a patentee should not be entitled to the same protection as every other person is entitled to claim from the Court from threatened injury where that threatened injury will be very serious. No part of the jurisdiction of the old Court of Chancery was considered more valuable than that exercise of jurisdiction which prevented material injury being inflicted, and no subject was more frequently the cause of bills for injunction than the class of cases which were brought to restrain threatened injury as distinguished from injury which was already accomplished. It seems to me, when you consider the nature of a patent right, that where there is a deliberate intention expressed and about to be carried into execution to infringe certain letters patent under the claim of a right to use the invention patented, the Plaintiff is entitled to come to this Court to restrain that threatened injury. Of course it must be plain that what is threatened to be done is an infringement. I find that in this case the Plaintiff alleges that "the Defendants continue and threaten to continue, and unless restrained by the order and injunction of this honourable Court, intend to continue, the use of the said machinery or tools, and the manufacture and sale of screws and screw-drivers in manner afore-

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said." To that allegation made in the statement of claim the Defendant *Loe* put in this statement of defence, in which he says, "For the reasons more particularly appearing by his counter-claim, the Defendant *William Clarke Loe* claims that he is entitled to use the said machinery and tools, and to manufacture therewith screws and screw-drivers, and he says that it is his intention to do so if and so soon as he is able to perfect the said machinery so that he can manufacture the same at a profit, which so far he has not been able to do." It is quite true that that statement of defence was afterwards amended, but it is not the less a statement which he has put forward of a fact, a statement put forward on the part of the Defendant, and I intimated that view to his counsel before he was examined, in order that they might avail themselves of the opportunity of asking him whether he denied that he had ever made such a threat or ever expressed such an intention. They, however, no doubt wisely and prudently, declined to avail themselves of that opportunity, and accordingly it remains without any denial or qualification, or suggestion of denial of any kind than that the instructions came otherwise than from the Defendant *Loe*.

Then, if the threatened act so claimed as of right is proved to constitute an infringement of the Plaintiff's patents—and I consider it is proved—that, in my opinion, would be a ground for granting an injunction. But this case does not depend upon that alone; for I think, as regards one part of the case, there can be no question about the infringement—that is, as regards the machine made according to the patent of 1875 by Mr. *Jabez James*. [His Lordship then reviewed the evidence on this subject.]

The other point raised was a curious one, and by no means free from difficulty, and what occurred with regard to that was this, that the Defendant at various times made screw blanks, as he said, not in all more than 2 lbs., by various contrivances by which no doubt screw blanks were made according to the Plaintiff's patent of 1870, as well as that of 1875; they seem to have been an infringement of both. He said he did this merely by way of experiment, and no doubt if a man makes things merely by way of *bonâ fide* experiment, and not with the intention of selling and

making use of the thing so made for the purpose of which a patent has been granted, but with the view of improving upon the invention the subject of the patent, or with the view of seeing whether an improvement can be made or not, that is not an invasion of the exclusive rights granted by the patent. Patent rights were never granted to prevent persons of ingenuity exercising their talents in a fair way. But if there be neither using nor vending of the invention for profit, the mere making for the purpose of experiment, and not for a fraudulent purpose, ought not to be considered within the meaning of the prohibition, and if it were, it is certainly not the subject for an injunction. But, where you see a man using a machine as this Defendant has done, under claim of a right to use it, and under that claim of right he makes a quantity of goods, even though a small quantity, I cannot call that an experiment within the meaning of the rule as to experiments. He has made a machine, and, knowing it to be an infringement of patent, he claims the right to make and use it, and his experiment is made to see how his machine works. That is the experiment, as he calls it, putting his machine to work from time to time, and then making screws according to the other patent, and making the screws with the view of trying the screws themselves. It does not appear to me, when I consider the circumstances under which the Defendant made these alleged experiments, that I ought to treat this as coming within the rule which prevents mere experiments being subject to the liability of action being brought against those who make them, and to the costs of an injunction being granted against them. In this case I consider that the Defendant was making the screws in exercise of an alleged right which has been disproved at the trial.

That being my view of the case, I give a verdict for the Plaintiff on all points, and grant him an injunction to restrain in the usual way the infringement of either of his letters patent by the Defendant. I also order the Defendant either to deliver up to the Plaintiff or to destroy in his presence any machinery in his possession or power, and to pay the costs of the action.

Solicitor for Plaintiff: *C. H. Edmands.*

Solicitors for Defendants: *H. Kimber & Co.; Faithfull & Owen.*

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1878
March 16.

STANDARD BANK OF BRITISH SOUTH AMERICA *v.* STOKES.

[1878 S. 106.]

Party-wall—Action by Co-owner—Undermining by adjoining Owner—Surveyor—Metropolitan Building Act (18 & 19 *Vict.* c. 122), *s.* 83, *sub-ss.* 7, 11; *s.* 85, *sub-s.* 7.

11 C.L.D. 413.
14 C.L.D. 194.

Although a co-owner of a party-wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall and replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet, when within the area of the *Metropolitan Building Act* (18 & 19 Vict. c. 122), such a work being a right in relation to a "party structure" within the meaning of sect. 83, sub-sects. 7, 11, cannot be carried out when a difference arises between the building owner and the adjoining owner (unless they concur in the appointment of one surveyor) except by the award of two surveyors and a third selected by them, or of any two of such surveyors, as provided by sect. 85, sub-sect. 7, of the Act.

Statement.

THIS was a motion on behalf of the Plaintiff company to restrain the Defendant, *Thomas Stokes*, from making or continuing any removal of the soil or support from under, or otherwise weakening or endangering the party-wall between the premises of the Plaintiff company in *Clement's Lane*, in the City of *London*, and the adjoining house and land on the south side of the said lane, in the occupation of the Defendant, *Thomas Stokes*.

The wall in question had been erected at the joint expense of the Plaintiff company and the Defendant some time previously, and had been held and used by them in common.

It appeared that the Defendant was constructing a sub-basement beneath his house, and in carrying out his work he had excavated, or begun to excavate, under the said party-wall, from which he had commenced cutting away the foundation of concrete and the *London* clay beneath it, and was substituting for it a new concrete foundation with new brick-work carried up beneath the party-wall.

On the 26th of September, 1877, the Defendant had served on the Plaintiff company the usual notice as to party structures under the *Metropolitan Building Act*, 1855 (18 & 19 Vict. c. 122),

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naming his surveyor. The Plaintiff company had also nominated their surveyor, but the two surveyors had not agreed upon the works in question, nor had they nominated a third surveyor as umpire.

The Plaintiff company alleged that the Defendant had no right to undermine the party-wall at all, and adduced evidence to the effect that it was "a risky operation."

The Defendant's evidence went to shew that with proper care the work could be safely carried out.

Argument.

Davey, Q.C., and *Bushby*, for the Plaintiff company:—

The Plaintiff company and the Defendant are in the position of tenants in common of the wall in question, and the Plaintiff company is entitled to restrain the Defendant from making the excavation under the party-wall, and from underpinning it. The Defendant has no right to do this work without the consent of the Plaintiff company, unless by statutory authority.

In *Cubitt* v. *Porter* (1) it was held that the common user of a wall separating adjoining lands belonging to different owners was *primâ facie* evidence that the wall belonged to such owners as tenants in common, and although it was there held that the pulling down of such a wall by one of the two tenants in common with the intention of rebuilding the same would not entitle the other to maintain an action of trespass; yet, as the premises to which the present action relates are within the provisions of the *Metropolitan Building Act*, 1855, the Defendant has no right to carry on the work unless the provisions of the Act are complied with.

This is a case which clearly comes within the scope of sects. 83 and 85 of the Act, and the Defendant, being a "building owner" within the definition of sect. 82, and the right to do the work being a right in relation to a party structure within sect. 83, he is bound, a difference having arisen, to comply with the requirements of sect. 85, sub-sect. 11. Here the Plaintiff company and the Defendant have each appointed a surveyor, but no third surveyor has been appointed as provided by the Act.

In the course of the argument on the motion, the surveyors of the two parties having agreed to appoint Mr. *Clifton* as third

(1) 8 B. & C. 257.

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surveyor, the Defendant undertook to execute the works under the direction of the two surveyors, or of Mr. *Clifton* in case of difference.

The only remaining question was that of costs, with a view to which counsel were further heard on the questions of law raised in the case.

Argument.

Marten, Q.C., and *Hull*, for the Defendant:—

The Defendant is at liberty to make any sub-basement which he thinks fit under the party-wall. He is, in fact, substituting concrete of the best quality for the *London* clay, and building upon it in such a manner as to make the wall more secure. Whether the parties are owners in severalty or tenants in common of the wall, the Defendant is at liberty to use the sub-basement for any purpose he thinks fit, so long as no injury is done to the building. The Plaintiff company can claim no right to lateral support from the Defendant's basement: *Angus* v. *Dalton* (1). The case is not within the provisions as to party structures contained in sects. 83 and 85 of the *Metropolitan Building Act*, and the Defendant has not put himself in the wrong so as to make him liable to pay the costs of the Plaintiff company.

Davey, in reply.

Judgment.

JESSEL, M.R.:—

This matter is now reduced to a question of costs, but it involves, as sometimes a question of costs does, very important points of law; and as, according to my practice, the costs follow upon the legal right, I think it is absolutely necessary for me to decide upon the legal right in order to arrive at a decision as to the liability of either party to pay the costs.

The Plaintiffs allege that they are the owners of a house with a party-wall. The Defendant is the owner of the adjoining house, and there is no dispute about the wall in question being a party-wall. The Defendant is constructing or attempting to construct a sub-basement—that is, a floor under the basement—and for that purpose he is excavating the earth from beneath his own basement,

(1) 3 Q. B. D. 85.

and also from beneath the party-wall, and he purposes in doing that to do, or has actually done this, he has cut away the concrete foundation of the wall, and intends to fill up the space occupied by the concrete foundation and by the *London* clay beneath the wall by a solid foundation of brick, making a new wall below the old wall, which itself in its turn will be supported by a new concrete foundation. The Plaintiffs say that the work may be done safely if executed with great care, but that it is a "risky" work, and one likely to lead to danger. The Defendant says that he is and will be very careful, and that with care the work will not be dangerous to any one.

Another question arises, whether or not what is proposed to be done is within the provisions of the 83rd section of the *Building Act*. Looking at the position of the parties independently of the *Building Act*, I have no evidence before me at the present moment as to the boundaries of the properties. All I have is, that there has been a common user of the wall, which seems to have been erected by the Plaintiffs some time back at the common expense of the Plaintiffs and the Defendant, and I have nothing to shew how that wall came to be so used and enjoyed. The question is, what does the law presume from that? I have been referred to an authority which says that, in the absence of any evidence beyond what I have mentioned, there was sufficient for a jury to find that the wall was held by the two parties as tenants in common, and beyond that the case does not go. The result therefore is, that according to that authority there is sufficient for me to find, if I think fit, that the wall is held by the Plaintiffs and Defendant as tenants in common. If I do not think fit to decide the question, which probably would be the more correct course to take, then I should remit it for further inquiry to see what the boundaries of the two properties were, which could probably be soon ascertained.

But, supposing I were driven to the conclusion that the Plaintiffs and Defendant were tenants in common, what would their rights be? Now as to that, the very case to which I have been referred enables me to give an answer, and that case is the case of *Cubitt* v. *Porter* (1). All the three Judges there, and very eminent

(1) 8 B. & C. 257.

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Judges they were, were agreed that you cannot have an action by a tenant in common against another tenant in common merely because he pulls down the wall which belongs to them as tenants in common, if it is a temporary thing; "a temporary removal with a view to improve part of the property on one side at least, and perhaps on both." "There is no authority to shew that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made." I read that from the judgment of Mr. Justice *Bayley* (1). Then Mr. Justice *Holroyd* says this (2): "Taking it to be the law that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the Defendant in this case cannot be considered as a destruction of the wall, the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible." Then Mr. Justice *Littledale* says (3): "If two persons be tenants in common of land on which there is a wall, and one refuses to repair and the other pulls down the wall and sells the materials and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy in common, an action of trespass will not be maintainable;" and then he says, if it is partial damage you must have an action on the case.

The result, therefore, is this: that what the Defendant is doing, namely, the removing of the foundation of the old wall, be it for the purpose of putting in as good a foundation or a better one—for he is doing it, as it is stated, by beautiful concrete—it is not a destruction by a tenant in common. All that has been done has

(1) 8 B. & C. 265. (2) 8 B. & C. 267. (3) 8 B. & C. 270.

been done in this case with the *bonâ fide* intention of supporting the wall, and will not entitle the other tenant in common to maintain an action, of course still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, the case here. That being so, it appears to me that at common law there would have been no right of action as far as the wall is concerned.

The next point is, taking away the narrow slip of clay which underlies the wall. Whatever might be the case with agricultural land, I do not think it can be pretended that, where a substratum of clay is used merely for the purpose of supporting a wall, the substitution of brick or burnt clay for the unburnt or native clay as a support of the wall can be deemed destruction or destructive waste. It is an improvement and not a destruction, and I should think, therefore, the removal of a portion of the clay, intending to substitute brick, would not be destructive waste, nor would it entitle the Plaintiffs to an injunction.

The remaining point is a totally different one. The Plaintiffs allege, and the Defendant denies, that, according to the true construction of the *Metropolitan Buildings Act*, 1855, whatever the rights at common law might have been, such right no longer exists, and that is the view I take myself of the Act. Part III. of the Act is headed, "Party Structures," and there is this preliminary section (sect. 82): "In the construction of the following provisions relating to party structures, such one of the owners of the premises separated by or adjoining to any party structure as is desirous of executing any work in respect to such party structure shall be called the building owner, and the owner of the other premises shall be called the adjoining owner." Therefore you start by a definition as regards "any work." The next section, the 83rd, has this prefix, "Rights of building and adjoining owners." The building owner shall have the following rights in relation to party structures, that is to say"—does not that mean he is to have no other? Is not that the definition of the rights he is to have, meaning those are all the rights he is to have? In my opinion that is the meaning of the section. The law of the metropolis now defines the rights of a building owner. He is a building owner within the definition of the 82nd section, because he wants

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to do some work in respect of a party structure, and, being such a building owner, he has these rights, which, in my opinion, are exclusive, and he has no other rights.

When we come to look at the sub-sections I think that is manifest. Sub-sect. 1 gives this right: "A right to make good or repair any party structure that is defective or out of repair." Now, as he had a right at law as a tenant in common wherever he was tenant in common to repair or to improve, this sub-section would have no particular meaning, unless read as a limitation of right, because if he has only to give notices under the *Building Act* when the party structure is defective or out of repair, but may make good or repair it when it is not defective or out of repair without giving any notice, it would have this extraordinary result, that when the wall wanted nothing doing to it he might amuse himself by pulling out the bricks and putting in new ones or handsomer ones, without giving notice to anybody, at his own will and pleasure, whilst, when it was actually out of repair and defective, and wanted something doing to it very speedily, he could not touch it without giving notice. It is obvious that to read the Act of Parliament in this way, instead of carrying out the specified intentions of the Legislature, is simply to cast ridicule upon them, and I cannot consent to do that.

Then sub-sect. 2 gives "A right to pull down and rebuild any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same." Here, again, is a limited right to pull down and to rebuild to which the observations on the previous sub-section are applicable. But as I have read the law from the statements of eminent Judges, he has a right to pull down when the wall is neither defective nor out of repair if he only wishes to improve it or put up a better or handsomer one; and consequently it would be again a right to do it with notice when the wall is defective or out of repair, but a right to do it without any notice when it wanted nothing doing to it, but the tenant in common wished to improve it or beautify it, and therefore wanted to pull it down.

Again, sub-sect. 6 specifies this further right: "A right to raise any party structure permitted by this Act to be raised, or any external wall built against such party structure, upon condition of

making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney-stacks belonging to the adjoining owner, on or against such party structure or external wall." The first question that arises upon this sub-section is whether the words "the right to raise any party structure permitted by this Act to be raised" are necessarily limited to raising the party structure above ground? I do not see the necessity. If the party structure were all above ground, and you put anything upon it, of course the raising must be above ground, but if the party structure were underground dividing two basements, and did not reach the surface, clearly then the raising would be underground. Is it necessary to limit the word "raise" to putting something on the wall on the top, and may not you raise or make it longer or build it up by something on the bottom? I do not think it is necessary so to hold, and, if it were absolutely impossible to underpin a wall except under this sub-section, my impression is that the sub-section would be wide enough to include it. But it is not necessary to insist upon this, because the 7th sub-section meets the case. It gives "the right to pull down any party structure that is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose upon condition of making good all damage occasioned thereby."

Here, I think, we have a section which, upon the principle of "*omne majus continet in se minus*," will include the case I have before me. You are going to make a sub-basement; you want, therefore, a wall of sufficient strength for the new building, which you intend to have built. For this purpose you may pull down the party structure, which of course would be of insufficient strength—it would fall down altogether if you took away its support by making the sub-basement—and you must build it of sufficient strength. If you may pull it down and rebuild it, why may you not do something short of that, and underpin it under that sub-section? It would be a very extraordinary reading of the sub-section to say that, although you have the right of pulling it down altogether and putting it up again, yet in rebuilding it you may not do something less, that is to say, support it, and put a new wall

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underneath it. I think that would be a very narrow view of the sub-section. Then there is the right to cut into any party structure, a right to cut away a footing, and then by the 11th sub-section there is a right "to perform any other necessary works incident to the connexion of party structure with the premises adjoining thereto." Now those are very large words. Why should I not read them to include again the case in question? It is a right to perform any necessary works "incident"—incident to what? Why, "incident to the connection of the party structure." Here, if you make the sub-basement and do not support the wall, it will fall down, and it is incident to its connection, because if it fell down its connection would be terminated in a very summary manner; and I think, therefore, there are words here which are quite large enough to include this right, and my interpretation and decision is, that they are large enough to include them, and therefore that this right is a right within the *Building Act* when it becomes necessary, or reasonably necessary, to perform it, that the right is not limited to putting bricks upon the top of the wall, and that you may increase the wall by putting bricks below the wall so as to enlarge it in that way as much as you may by putting bricks above the wall to enlarge it in the other way.

I think it the duty of the Court to read these Acts in a reasonable manner, with a view of carrying out the manifest intention of the Legislature that these party structures should not be interfered with by building owners without due notice to the person or persons other than the building owner interested in the party structure, and without its being referred to the surveyors to decide how the work should be performed.

This being, in my opinion, within the 83rd section, the rules of the 85th section, I think, are clear, though the wording might have been improved. It is quite true that in sub-sect. 7 of the 85th section there is a slight difference in the wording, but I think the fair meaning of the section is this, that where there is a dispute or difference—for the words are identical in meaning—the work shall not be done except with the sanction of the other owner who is interested in the wall, or if two surveyors are appointed, one to be nominated by each party, then the two are to choose an umpire, and the work shall be done according to the

direction of the majority of the surveyors or the umpire, and shall not be done in any other manner. The 7th sub-section is this: "In all cases not hereby specially provided for"—this is a case not specially provided for—"where a difference arises between a building owner and adjoining owner in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor"—which they have not done here—"they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference." As they have to determine the right to do and the time and manner of doing the work, it would really be reducing the Act to an absurdity to suppose that the building owner had a right to proceed with the work until they have so determined. It must mean that they are to determine the time, that is, the work is not to be done until the time is determined, and that, if the work is commenced before that time, the building owner is committing a breach of the Act of Parliament. Then there is a power of appealing, and the appeal may no doubt be delayed for a very considerable time; but if his right is, as I read it to be, a right merely to do that which the surveyor or the umpire may direct shall be done, the building owner has no right to do anything at all until he obtain such directions. The Defendant therefore had no right to proceed with his work until the direction of the surveyor had been obtained, and the Plaintiffs are entitled to come here to restrain his so proceeding.

The result therefore is, that in my opinion the Plaintiffs are right, and the Defendant is wrong in law, and the Defendant ought to pay the costs. I will order the proceedings in the action to be stayed on the Defendant undertaking to do the works in question, under the direction of two surveyors and Mr. *Clifton* as arbitrator, the further costs to be at the discretion of the arbitrator.

Solicitors: *Flux & Co.; J. Robinson.*

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March 21.

BROWN *v.* DALE.

[1876 B. 48.]

Voluntary Society—Sale of Society's Property—Right of Members to dispose of Proceeds of Sale.

Upon the sale of land belonging to a company of the nature of a voluntary society, with no rules or provisions as to the disposition of its property:—

Held, that the members of the company for the time being were entitled to divide the proceeds in equal shares.

Statement.

THE question in this case was as to the right of the members of an incorporated company or guild with reference to the proceeds of the sale of certain property belonging to the company.

The *Company, Society*, or *Fellowship of Fullers and Dyers* at *Newcastle-upon-Tyne* had existed for some centuries, and at the time of the sale of the property and at the time of the commencement of the action it consisted of seven members, namely, the Plaintiff and the six Defendants.

The property in question was taken by the Corporation of *Newcastle*, and the purchase-money amounted to £1750. At a meeting of the company held on the 7th of August, 1875, and convened by circular, it was resolved "that the money, £1750, be divided equally amongst the members of the company, namely, £250 each."

At the hearing of the action the money was ordered to be paid into Court, and inquiries were directed as to the rules of the company, and also as to who were entitled to be admitted as its members.

It appeared from the Chief Clerk's certificate that there were no written or printed laws or rules of the company regulating the disposition of the money or the admission of members, but that it had been the custom for the members of the company for the time being, or a majority at any meeting, to exercise unlimited control over the management of the company's property, and that it had been the practice to admit sons of members as of right on attaining twenty-one and becoming freemen of the borough of *Newcastle-upon-Tyne*.

It further appeared that, at the time of the meeting of the 7th

Statement.

of August, 1873, no other persons except the Plaintiff and Defendants were members or entitled to be admitted members, but that since that time four others had been admitted, and two others had become entitled to be admitted by reason of having attained twenty-one and taken up their freedom, and that twelve others would presumably become entitled—four who had attained twenty-one, on taking up their freedom, and the others, who were under twenty-one, on attaining that age and taking up their freedom.

The question arose, on further consideration, whether the seven members at the date of the resolution were entitled to the whole fund, or whether it should be shared by those who had since become members or would hereafter be presumably so entitled.

Argument.

Kekewich, Q.C., and *Hornell*, for the Plaintiff, contended that the seven persons who were actually members of the company at the time when the resolution was carried were entitled to divide the whole fund.

Lawson, for one of the Defendants who, as a steward of the company, represented the interest of the four members who had been admitted since the date of the resolution, and the others who would presumably become members, contended that, instead of the fund being divided, it ought to be invested, and the income divided year by year, as the same accrued, among the several persons who for the time being were members of the company.

Maidlow, and *Pope*, for the other Defendants.

Judgment.

JESSEL, M.R., considered that the fund in question was the property of the members of the company or guild at the time when the resolution was passed, and should be divided between the Plaintiff and Defendants in equal shares.

Solicitors: *Gregory & Co.; Redpath & Holdsworth*, agents for *S. J. Dale, North Shields.*

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March 28.

MATTHEW *v.* NORTHERN ASSURANCE COMPANY.

[1877 M. 254.]

Assurance Society—Policy Money—Action by Assignee—Payment into Court under Trustee Relief Act—Costs.

12 C.D. 176
15 C.D. 172

Money payable under a policy by a life assurance society on the death of the assured is not money held upon any trust, and cannot properly be paid into Court under the *Trustee Relief Act.*

On an action by the assignee of a policy against an assurance society, where a difficulty had arisen as to the title to the money, the Court being satisfied that the Plaintiff was entitled:—

Held, that the company had not discharged themselves by paying the money due on the policy into Court, and that they must pay to the Plaintiff the amount (which on petition would be ordered to be transferred to them), with interest and costs.

In re Hall (1), *In re United Kingdom Assurance Company* (2), and *In re Webb's Policy* (3), commented on.

Statement.

THIS was an action by the assignee of a policy of assurance against the Defendant company, which was a life insurance company incorporated by a special Act of Parliament.

In 1863 one *Archibald M. Pechi,* of *Moulmain,* effected an assurance on his life with the Defendant company for £500, and the company granted to him a policy of insurance, dated the 4th of November, 1863, in the form of a deed-poll, whereby, after providing for the payment of the premiums, it was provided that, if the premiums therein mentioned should be duly paid, "the capital, stock, and funds of the company shall be subject and liable to pay and make good the sum of £500 to *Pechi,* his heirs, executors, or assignees, within three months after his decease shall have been certified and proved to the satisfaction of the company.

On the 14th of October, 1865, *Pechi* assigned the policy to Messrs. *Grasemann & Co.,* a firm carrying on business at *Moulmain,* by the following indorsement thereon: "I assign over to Messrs. *Grasemann & Co.* the within policy. (Signed) *A. M. Pechi.*"

In 1869, notice in writing of the assignment and the date and

(1) 10 W. R. 37. (2) 34 Beav. 493. 11 Jur. N.S. 424
(3) Law Rep. 2 Eq. 456. 12 Jur. N.S. 595

purport thereof was given to the Defendant company on behalf of the assignees, the receipt of which was acknowledged.

On the 19th of August, 1873, *Pechi* died.

On the 11th of November, 1873, *J. Buchanan*, who claimed to be entitled to the policy as the surviving partner of the firm of *Grasemann & Co.*, and who had paid the premiums thereon to the Defendant company, assigned the policy to the Plaintiff, and on the 29th of November, 1873, *Buchanan's* solicitors sent a written notice of such assignment to the Defendant company.

It appeared that shortly after *Pechi's* death his executors had sent in a claim for the moneys payable under the policy, of which the manager had informed *Buchanan* before the last-mentioned assignment. On the 2nd of December, 1873, the manager wrote to the Plaintiff's solicitors, saying that they would not be justified in paying the policy moneys either to *Buchanan* or the Plaintiff without the concurrence of *Pechi's* legal personal representatives. In reply the Plaintiff's solicitors offered an indemnity or further security on payment.

On the 23rd of January, 1874, the Defendant company paid into Court, under the *Trustee Relief Act*, the sum of £560, being the amount due under the policy for the sum assured and the bonus or profit accrued thereon, to the following credit: "In the matter of the trusts of a sum of £560 secured by a policy of assurance, No. 11,478, effected on the life of *A. M. Pechi*, since deceased, in the office of the *Northern Assurance Company*, being money payable into Court to the like credit."

On the 7th of August, 1877, the Plaintiff brought his action, claiming payment of the sum of £560, with interest thereon at £4 per cent. from the 30th of January, 1874.

The Defendant company alleged that, having regard to the form and terms of the assignment of the 14th of October, 1865 (which appeared to be without consideration), and the doubtful legal effect thereof, and the conflicting claims of *Pechi's* representatives and the Plaintiff as the assignee of *Buchanan*, and all the circumstances of the case, they could not safely pay the moneys either to the said representatives or to the Plaintiff without the concurrence of both those parties; and that they had therefore availed themselves of the provisions of the *Trustee Relief Act*; and they contended that

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Argument.

by the payment into Court of the moneys they were discharged from all liability under the policy. They further alleged that they had no satisfactory evidence that *Buchanan* was the surviving partner of the firm of *Grasemann & Co.*

Ince, Q.C., and *Buckley*, for the Plaintiff:—

The Plaintiff, as assignee of the policy, is entitled to payment of the money thereby assured. The defence raised by the Defendant company is that they have discharged themselves by payment into Court, under the *Trustee Relief Act*, of the amount due under the policy. That defence is not sustainable, as they were not in the position of trustees within the meaning of the Act.

[They referred to *In re Hall* (1); *In re Webb's Policy* (2); *In re Haycock's Policy* (3); *Desborough* v. *Harris* (4).]

Davey, Q.C., and *Stevens*, for the Defendant company:—

The company in this case is wholly discharged by reason of the payment of the money into Court. It appears that there was a question as to the title to the money, the representatives of the assured having sent in a claim, and it not being clear who was properly entitled to the money. Under these circumstances the company were justified in refusing to pay the money until it was clearly established who was entitled to receive it, and they adopted the proper course in paying the money into Court. The company were constructive trustees within the meaning of the *Trustee Relief Act*, the money having been paid into Court in the matter of the trusts of the sum of money secured by the policy. They were not in the position of ordinary creditors, as by the form of the policy the stock and funds of the company were "liable to pay and make good" the sum assured. In the case of *In re Hall* Lord *Cranworth* considered that money payable under a policy, the right to which was disputed, was properly paid in under the Act. The same view was held by Lord *Romilly* in the case of *In re United Kingdom Assurance Company* (5); and again by Vice-Chancellor *Wood* in the case of *In re Webb's Policy*. This being so, we

(1) 10 W. R. 37.
(2) Law Rep. 2 Eq. 456.
(3) 1 Ch. D. 611.
(4) 5 D. M. & G. 439.
(5) 34 Beav. 493.

submit that the Defendant company are entitled to their costs of the payment into Court, and also to the costs of the action, as the Plaintiff had not shewn his title when the action was commenced.

JESSEL, M.R.:—

The first question is, whether the company are wholly discharged, because, as I read these pleadings, the company plead a complete defence to the claim, and this will have some bearing on the question of costs. The case must be stated in order to see what the nature of the defence is. It is shortly this:

The company granted a policy of insurance, which, although certainly very much like the ordinary form of policy, is very badly drawn, and I hope after this judicial investigation that the company will see that their policies are better drawn in future. The Defendants allege that they have paid into Court the money which is due on the policy under the Act for the relief of trustees, and that that is a discharge.

Now, what is the position of the company under the policy? It is a policy under the seal of the company, signed by three directors and countersigned by the secretary, and is in the form of a deed-poll. It provides that "the capital, stocks, and funds of the said company shall be subject and liable to pay and make good the aforesaid sum of £500 to the assured, his heirs, executors, or assigns, within three calendar months next after the decease of the assured, shall have been certified and proved to the reasonable satisfaction of the company." What does that mean? Of course it means that the money shall be paid. It is absurd to read these words in the policy, "subject and liable to pay," as meaning that it is not to be paid. It must be considered that the stock of the company shall be applied in payment of the amount due on the policy, or that they shall pay it out of the stock.

I have no doubt that no such contention as that raised here would have been raised if the action had been brought at common law before the passing of the *Judicature Act*. Nothing could be more fatal to the interests of this company than to hold that they are mere trustees who have executed an equitable assignment of their stock in favour of every policy-holder. How they could deal with their assets, or carry on their business, if that was the effect

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of the policy, I am utterly at a loss to understand. I decide that it is meant to be an ordinary policy of insurance, and that it is, in fact, a covenant to pay so far as the capital and stock of the company will extend.

That being so, what is the position of the company? Why, the company is the debtor, and the assignee, or legal personal representatives of the assured, is the creditor; and I should have thought, but for some authorities which have been cited, that that point was too plain for argument, but this case shews that what is too plain for argument to one mind is not too plain for argument to another mind, and that after argument a case may be decided in a different way by one Judge from what it would be decided by another Judge. Therefore, with the modesty which ought to be felt by one Judge in speaking of the decision of other Judges, I may be allowed to say that I am speaking of the impression on my own mind, and therefore I say it is not clear to my mind, although I decide the other way, that other Judges are wrong. But I am happy to say on looking over the authorities that they are not all one way.

There is a case decided by Lord *Cranworth* while Lord Chancellor, *Desborough* v. *Harris* (1), where he treated the company, who had granted an ordinary policy of insurance, as a debtor, and the person entitled to receive the purchase-money as a creditor, and discussed their rights on that footing throughout; so that the view I take is sanctioned by very high authority. Nor do I find, when I come to examine the authorities closely, that a different view is taken of the position of the parties.

In the case of *In re Hall* (2) Lord *Hatherley*, then Vice-Chancellor, incorrectly, in my opinion, apprehended the effect of a policy of insurance. In that case an insurance company had paid in a sum of money under the *Trustee Relief Act*, and the Vice-Chancellor says that "it had been held that a mere stakeholder could pay in a fund under the *Trustee Relief Act*, and therefore the company were justified in so doing." He does not mention the authority where it had been so held; but even if that were so, a debtor is not in the position of a mere stakeholder, even where the creditor has dealt with the debt so as to make two claims to it.

(1) 5 D. M. & G. 439. (2) 10 W. R. 37.

He may interplead, and in that sense, and in that way, and to that extent, may be described incorrectly as a stakeholder; but that is a peculiar case, and an ordinary debtor cannot be considered a stakeholder. But when I come to look at the case of *In re Hall* (1) I find it was not an ordinary policy; it was a family policy, and it seems to have been thought that there was something peculiar or special about the case.

The matter came before Lord *Romilly* in the case of *In re United Kingdom Life Assurance Company* (2). What happened there has happened, according to my experience, very often. An eminent Queen's Counsel, now Lord Justice *Baggallay*, and Mr. *Everitt*, were counsel for the Petitioners, and Mr. *Caldecott*, who was counsel for the Respondents, the *Aldersons*, who brought in a claim; he took the point that they were not liable to pay the costs because the *Trustee Relief Act* did not apply. It was not the company who took the objection; it was not the trustees who took the objection, but he took the objection to avoid the payment of costs, so that he was not in a very favourable position. Mr. *Wickens*, for the insurance company, as to the right to pay in under the *Trustee Act*, cited *In re Hall*. Then the Master of the Rolls said (3) "that he concurred with Vice-Chancellor *Wood* that mere stakeholders might pay money into Court under the *Trustee Relief Act*, though they might not, strictly speaking, be termed trustees. He ordered the costs of the company of and relating to the payment into Court, and of this application, as between solicitor and client, and the costs of the Petitioners, to be paid by the Respondents, the *Aldersons*." So that he agreed that they were not trustees. He said they were mere stakeholders, and he concurred with Vice-Chancellor *Wood*. He did not really, as far as I can see, give a judicial judgment on the matter. It is a case in which he was not very anxious to decide favourably to the objecting party, and he ordered the Respondents to pay the costs, which they ought to have paid in any event. No doubt it might have required a bill to make them pay them. That is all he decided. As I understand, he thought they were not strictly trustees, but that the Act applied to a mere stakeholder though not a trustee.

(1) 10 W. R. 37. (2) 34 Beav. 493 (3) 34 Beav. 494.

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Then when the matter came before Vice-Chancellor *Wood* in the case of *In re Webb's Policy* (1), it came in this way: there were some very important questions to be argued out between the parties. They did not object at all; it was principally desired to take the opinion of the Court, they all took the benefit of the payment into Court, they did not object to pay the costs of the company, but they did object to pay the costs as between solicitor and client, and that is how the question came to be decided. Mr. *Wickens*, for the *Assurance Company*, argued "that the company were entitled to costs as between solicitor and client. In an interpleader suit no doubt the Plaintiff was entitled to costs only as between party and party, but the intention of the framers of the *Trustee Act* (10 & 11 Vict. c. 96, s. 1) was not to substitute a proceeding for an interpleader suit. It was rather to substitute a proceeding for a suit to administer a trust and to relieve persons who held moneys belonging to others in their hands;" and he cited *In re United Kingdom Life Assurance Company* (2). There Vice-Chancellor *Wood* observed, "I think the question was argued before me, and decided in a case of *In re Hall* (3)." The argument on the other side was that the company were stakeholders, and were to have their costs as between party and party. The Vice-Chancellor consulted the Master of the Rolls, the Master of the Rolls having relied upon him in *In re Hall*, and what he says is this (4): "I observe that in the case of *In re United Kingdom Assurance Company*, where the Master of the Rolls had to determine upon the propriety of payment into Court by an insurance company of the proceeds of a policy, his Lordship decided that a stakeholder of this description came within the designation in the Act of 'trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust;' and he appears to have given the company their costs as between solicitor and client without any argument." Then, after saying that the Master of the Rolls agreed with him, he goes on: "The object of the Act was to relieve not only trustees, executors, and administrators, but other persons having trust moneys in their hands, and to enable them to obtain a cheap and efficacious mode of having the

(1) Law Rep. 2 Eq. 456.
(2) 34 Beav. 493.
(3) 10 W. R. 37.
(4) Law Rep. 2 Eq. 458, 459.

rights of the parties settled. It is in every way desirable that this form of proceeding should be encouraged rather than otherwise." He does not decide they are trustees although they have trust moneys, but he says, "the Master of the Rolls has decided that it was desirable to encourage this form of proceeding," and that is all. I may say neither Judge, in fact, said there was a trust. The case arises on a very plain Act of Parliament, and it appears to me that it is a case of an ordinary debtor, not a stakeholder, for a debtor cannot, except in a very limited sense, be called a stakeholder, although he can file a bill of interpleader where the creditor has so dealt with the debt that he cannot find out whose debt it is, and in that sense he is sometimes called a stakeholder.

That being the position of matters, I have only to look at the Act of Parliament. I must say that the Act of Parliament is, to my mind, very plain indeed. The "trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatsoever," are, after describing the instruments creating the trusts, to pay into Court to the credit of the trust. Therefore it must be moneys subject to some trust. That is what they are to do, and they are to pay it into Court "in the matter of the particular trust" (describing the trust by the names of the parties). What trust is it that these people are to describe, or under which they are to pay in? It is well to see from the affidavit of the trustees what it was.

It is in the matter of the trusts of a sum of money secured by a policy. What trust was created by the policy? I asked the counsel for the Defendant to tell me what the trusts were, if there were any. There is no trust at all. It is simply to pay to the assured, his heirs, executors, or assigns. It is not within the Act at all. That answers the question at once. There is no trust declared of it, and what the Act means is very plain; it is constructive trusts. The words are "trustees, executors, administrators, or other persons having any moneys belonging to any trust," and they apply to persons holding moneys subject to a trust, and not knowing what to do with them, and there is no question whether they can be called trustees. It does not appear to me that there is any trust declared of this insurance policy, or any trust to which the Act could apply. That being so, I decide,

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by no means disagreeing with the view entertained by Lord *Romilly*, although probably disagreeing with the view expressed by Vice-Chancellor *Wood*, that these Defendants were not trustees, and certainly not trustees under the instrument with which we have to deal.

I now come to the next point. It is said, and said with truth, that there were all sorts of difficulties raised, and that the Defendants might, if they thought fit, have said, "We will not pay you unless you prove your title;" but if they had done that, they must have paid the costs. If a debtor says to his creditor, "I am not satisfied with your title, you have a title derived through a course of time, some parts are of doubtful construction, some of doubtful authenticity, I require you to prove your case," the creditor may say, "I will bring an action and prove my case," but the debtor is liable to pay the costs. It is a very useful practice for the creditor to shew his title to the debtor before bringing his action. What I am about to say is not intended to encourage people to bring actions on policies of insurance without adopting that course, but I say if they had adopted that course in this case, and the company had not been satisfied, and the Plaintiff brought an action, the Plaintiff would, in my opinion, have obtained his costs as a matter of course. No argument, in my opinion, can be founded on the fact that there were difficulties as to title.

Then I come to the next point. The creditor delayed a long time after giving notice to pay before bringing action. Here, again, I must consider what the company did. If the Defendant company had come and offered to pay the money, and stayed the action, I am not prepared to say that I should, as a matter of course, have given the Plaintiff his costs. It is not for the Court to encourage vexatious litigation. But the company paid the money into Court under the *Trustee Relief Act*, and disputed the Plaintiff's right to succeed in the action. I am not only not satisfied that they were right in paying it into Court, but I think the Act did not apply. [His Lordship then commented on the facts of the case, and said that the duty of the company was to have written to the executors giving them notice of the assignment, and asking them if they disputed it, and telling them that if they did they must take the consequences. His Lordship con-

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tinued:—] I think the company had no sufficient justification for not taking the proper steps to ascertain whether there was a dispute or not, instead of paying the money into Court under the *Trustee Relief Act*. It follows from what I have said that the company must pay the amount with interest, and the costs of the action. If a petition is put into the paper for the purpose of obtaining an order for the fund to be transferred to the company I will make the order.

There will be judgment for £560, with interest at £4 per cent. from the 30th of January, 1874.

Solicitors: *W. W. Wynne; Lyne & Holman.*

BEDDOW *v.* BEDDOW.

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April 17.

[1878 B. 56.]

Practice—Injunction—Jurisdiction of High Court—Common Law Procedure Act, 1854, *ss.* 79, 81, 82—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Arbitration—Unfitness of Arbitrator.*

The extensive jurisdiction of granting injunctions originally given to the Common Law Courts by the *Common Law Procedure Act*, 1854, ss. 79, 81, and 82, is now vested, by virtue of the *Judicature Act*, 1873, in the High Court of Justice. All acts, therefore, which a Common Law Court, or a Court of Equity only, could formerly restrain by injunction, can now be restrained by the High Court.

The jurisdiction of granting injunctions thus vested in the High Court is practically unlimited, and can be exercised by any Judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles.

The Court will restrain an arbitrator by injunction from acting, in any case in which he is, in the opinion of the Court, unfit or incompetent to act.

Statement.

THIS was a motion by the Plaintiffs, the executors of a testator, *William Beddow*, deceased, for an injunction to restrain the Defendant, *Samuel Hipkins*, from acting as referee or arbitrator under the provisions of an agreement dated the 26th of April, 1877, and made between the Plaintiffs of the one part, and the Defendant, *John Beddow*, of the other part.

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Statement.

The Defendant, *J. Beddow*, and the testator had been in partnership as brick-manufacturers, and upon the testator's death the Defendant *Beddow*, in March 1877, agreed with the Plaintiffs to purchase the testator's share in the business upon a valuation to be made by the Defendant *Hipkins* on behalf of the Plaintiffs, and by one *Blades*, on behalf of the Defendant *Beddow*. That valuation was accordingly made, but notice having been given prior to the testator's death by the *London and North Western Railway Company* to take part of the brickyard upon which the partnership business had been carried on, that part of the brickyard was expressly excluded from the valuation.

The agreement in question, of the 26th of April, 1877, was then entered into, by which it was provided that the amount which should be received from the railway company as compensation for taking any part of the brickyard should be apportioned between the Plaintiffs and the Defendant, *J. Beddow*, according to the arbitration of *Hipkins* and *Blades*, with an ultimate reference to an umpire in case of disagreement.

On the 10th of August, 1877, *J. Beddow* attended at the office of the Plaintiffs' solicitor to pay the balance due from him to the Plaintiffs on the original valuation, and paid the whole in cash except £197, for which he offered trade acceptances to that amount. The Plaintiffs, however, refused to take the acceptances, whereupon *Hipkins*, who was present, offered to give his cheque for the amount, he taking the acceptances in exchange. The Plaintiffs assented to this offer, and accordingly took *Hipkins'* cheque for £197, which was made payable to *J. Beddow's* order and indorsed by him. It was, at the same time, arranged that the Plaintiffs should not present the cheque for twenty-one days in order to give *Hipkins* time to get the bills paid or discounted.

After the expiration of the twenty-one days *Hipkins'* cheque was presented for payment at his bankers' but was dishonoured, and the amount of it was afterwards paid to the Plaintiffs by *J. Beddow* himself.

Hipkins had, immediately upon receiving the acceptances, discounted them, but he failed to apply the proceeds in meeting the dishonoured cheque. *Hipkins* having, under these circumstances, become indebted to *J. Beddow* for the amount of the cheque, an

agreement was entered into between them by which a boat and certain castings were accepted by *Beddow* in part payment of the debt, and the balance was to be paid by *Hipkins* in monthly instalments of £2 each. The amount of the debt now remaining due was £178 15*s.* 3*d.*, secured by *Hipkins*' promissory note.

Statement.

The Plaintiffs, considering that *Hipkins* had placed himself in such a position with regard to the Defendant *Beddow* as that he would not in all probability exercise his duties as their arbitrator with impartiality, requested the Defendant *Beddow* to substitute a new arbitrator. He, however, insisted on *Hipkins* acting as the Plaintiffs' arbitrator, whereupon the Plaintiffs brought the present action for *Hipkins*' removal, and for leave to substitute a new arbitrator or referee in his place; and they now moved in the terms above mentioned.

Argument.

Chitty, Q.C., and *Warmington*, for the Plaintiffs.

Millar, for the Defendant *Beddow*:—

The Court has no jurisdiction to remove an arbitrator except on the ground of corrupt conduct. The mere fact that the arbitrator is indebted to one of the parties does not render him incompetent to act so as to give the Court jurisdiction to remove him: *Morgan* v. *Morgan* (1); *Drew* v. *Drew* (2); *Russell* on Arbitration (3). I admit an arbitrator may be removed on the ground of corruption: *Malmesbury Railway Company* v. *Budd* (4); but there is no such case made here.

W. S. Owen, for *Hipkins*, expressed his willingness to retire, if both parties consented to his doing so.

Judgment.

JESSEL, M.R.:—

This case no doubt raises an important question, though as often happens, the pecuniary interests involved are comparatively small. The first question is, what is the jurisdiction of the Court in general? It is to be remembered that the jurisdiction of the Court of Chancery to grant injunctions was formerly limited; it

(1) 1 Dowl. 611.
(2) H. L. March 8, 1855.
(3) 4th Ed. p. 103.
(4) 2 Ch. D. 113.

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was limited by the practice of different Chancellors. The jurisdiction was never extended in modern times beyond what was warranted by the authorities; and in course of time various vexatious and inconvenient restrictions were adopted. The granting of an injunction was always looked upon as an extraordinary exercise of jurisdiction, but it is not so now. One of the most useful functions of a Court of Justice is to restrain wrongful acts; and a power of this kind was given to the Common Law Courts in the largest terms by the *Common Law Procedure Act*, 1854, s. 79. That section says, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus"—there is no limit beyond this, that the section only applies to a common law action —"claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right."

And the 81st section says that "In such action judgment may be given that the writ of injunction do or do not issue, as justice may require;" that is to say, as to the Judge may seem right according to law. That is confirmed by the 82nd section, which provides that it shall be lawful for the Plaintiff at any time after the commencement of the action to apply *ex parte* to the Court or a Judge to restrain the Defendant from the repetition, continuance, or committal of any wrongful act; and that such writ may be granted or denied by the Court or Judge upon such terms "as to such Court or Judge shall seem reasonable and just." What is reasonable and just is the only limit. No doubt the Court of Chancery was not originally limited by any other terms; but the instances in which an injunction might be granted were decided by that Court, and there were certain well-known cases in which it was settled that the Court ought not to grant an injunction. All that is covered by the *Common Law Procedure Act*, even in those cases.

That being so, when we come to the *Judicature Act*, 1873, we find this: First, all jurisdiction whatever which was exercised by any of these Courts is transferred to the new Court. Next, all Acts

of Parliament applying to any one of the old Courts apply to the High Court of Justice, which consequently has jurisdiction to grant injunctions whenever it may seem just.

Now I rely upon those provisions, because they seem to me to explain the 25th section (sub-sect. 8) of the *Judicature Act*, 1873, which says, "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient." If this can be done by interlocutory application *à fortiori* it can be done at the trial of the action, on the principle of "*omne majus continet in se minus.*" Next, by the *Common Law Procedure Act* this power would have been exercised at the trial as far as it was "just." The only addition is that in the *Judicature Act* you have "just or convenient": not that that would be convenient which was unjust; but that in ascertaining what is "just" you must have regard to what is convenient. All acts, therefore, which a Common Law Court or a Court of Equity only could formerly restrain by injunction, can now be restrained by the High Court.

That being so, it appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to. In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles.

What, then, is the complaint in this case? It is this. An arbitrator nominated by the Plaintiffs becomes unfit for his office by reason of personal misconduct. Ought the Court to decide that it has not power to interfere in a case of this kind? It is a settled principle that no inferior tribunal, whether it be a Judge, an arbitrator, or other judicial or *quasi*-judicial person, ought to be allowed to proceed in the hearing of a case which such Judge or arbitrator is, for any special reason, unfit or incompetent to hear.

Now, one of the well-known grounds of incompetence is personal interest. If in the course of the arbitration it is discovered by one of the parties, to whom it was at first unknown, that the arbitrator

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has a large interest in the subject-matter of the award, it is not necessary to wait for the award and then take proceedings to set it aside, but the party may come to have the arbitrator removed.

Again, if personal unfitness has arisen from infamy—an expression well known to the common law—that is, perjury or fraud—it is clear that a man will be unsuitable to exercise judicial or *quasi*-judicial functions. Could it be tolerated that in a civilized country there should be no remedy for a case like that? Under such circumstances there must be some means of getting rid of an arbitrator.

Then, of course, personal misconduct less than that which has just been suggested would suffice. A man may have so conducted himself that, even in the absence of a legal conviction, he would be obviously unfit for the exercise of such functions. It is clearly the duty of the Court to interfere in such a case. The only question is whether the arbitrator has so acted in this case that he is unfit to proceed with the arbitration. There are very few facts, and they are undisputed. [His Lordship stated the facts as above, and continued:—]

It is said that this man ought to be allowed to remain arbitrator after the Plaintiffs have objected to him and requested that he should not act. I must say that I think he is not a fit person to undertake the duties of arbitrator, that it is not probable that he will faithfully and honestly discharge his duty, and I shall therefore grant an injunction in the terms of the notice of motion.

The costs will be costs in the cause.

Solicitors: *G. S. Warmington; E. Flux & Leadbitter*, agents for *J. F. Crump, Walsall; Harper, Broad, & Battcock*, agents for *W. T. Travis, West Bromwich.*

BRETON *v.* MOCKETT.

V.-C. M.

1878

June 26.

[1875 B. 31a.]

Will—Absolute Interest—Consumable Articles—Farming Implements—"Not accountable for Depreciation."

A testator gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock, and after her decease he gave the residue of his personal estate to his children:—

Held, that the widow took an absolute interest in the farming implements and stock.

Statement.

JOHN W. BRETON, of *Hailsham, Sussex*, by his will, dated the 4th of November, 1873, appointed his wife, *Emma Breton*, executrix, and bequeathed all his personal estate (including all his farming implements and stock, live and dead) unto her for her life, and declared that she should be unimpeachable for waste, and should not be liable to account for any diminution or depreciation in the said farming implements and stock, alive and dead, and after her decease he bequeathed the rest, residue, and remainder of his personal estate upon trust for his children.

The question arose whether Mrs. *Breton* took an absolute interest in the farming stock and implements, so as to be entitled to the proceeds thereof on a sale.

Argument.

J. Pearson, Q.C., and *Hume*, for the widow, relied on *Randall* v. *Russell* (1) and *Phillips* v. *Beal* (2) as shewing that consumable articles could not be given over.

Whitehorne, for the infant children:—

The provision as to depreciation cannot give Mrs. *Breton* the absolute interest. It is decided that where a business and stock-in-trade is given for life, the stock-in-trade though perishable does not go absolutely to the donee: *Cockayne* v. *Harrison* (3).

[MALINS, V.C.:—No doubt, if the testator had given his widow the farming stock and implements without saying that she was

(1) 3 Mer. 190. (2) 32 Beav. 25.
(3) Law Rep. 13 Eq. 432.

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not to be liable for depreciation, then, if there had been a sale of the articles, she could only take the income of the proceeds.]

J. Pearson, in reply, was stopped by the Court.

Judgment.

MALINS, V.C.:—

This gift must be construed as the gift of an absolute interest. Mrs. *Breton* might allow every animal on the farm to die, and every implement to wear out, and is under no obligation to repair or replace any loss or wear and tear. The executors would have no right to interfere or to ask her whether she had sold or given away anything forming part of the live stock or implements. This must be equivalent to an absolute gift of those articles which *ipso usu consumuntur*. The real intention of the will is that the widow is to use the farming stock for her life, but she is not a mere tenant for life, but when the articles get worn she may get rid of them. There is no obligation for her to carry on the farm as there was in *Cockayne* v. *Harrison* (1), and I decide accordingly that the children take no interest in the farming stock and implements.

Solicitors: *Dawes & Sons.*

V.-C. M. 1878 *July* 24.

PARNALL *v.* PARNALL.

[1876 P. 131.]

Will—Absolute Interest—Precatory Trust.

10 Ch D 734 7 Jeff Cas 324

A testator gave his wife the whole of his real and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children":—

Held, that this was not a gift coupled with a trust, and that the widow took an absolute interest in the property.

Statement.

EDWIN PARNALL, of *Exeter*, in his will, dated the 23rd of November, 1871, made the following devise and bequest:—

"I give and bequeath to my wife *Ann Parnall*, after the pay-

(1) Law Rep. 13 Eq. 432.

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ment of my just debts, the whole of my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death be equally divided between my children."

The widow claimed to be absolutely entitled to the property, and the question came on to be decided on demurrer whether the property was affected with a trust for the benefit of the children.

Argument.

J. Pearson, Q.C., and *Byrne*, for the widow, cited *Attorney-General* v. *Hall* (1); *Lechmere* v. *Lavie* (2); *Bland* v. *Bland* (3); *Wynne* v. *Hawkins* (4); *Perry* v. *Merritt* (5); *Cowman* v. *Harrison* (6); as shewing that where there is no certainty of the subject of the gift there can be no gift over.

Glasse, Q.C., and *Campbell*, for the children, cited *Horwood* v. *West* (7); *Le Marchant* v. *Le Marchant* (8); *Foley* v. *Parry* (9). This is a case where, if the wife elects to take the property, she does so on condition of leaving what remains to her at her death to the children, as in *Willis* v. *Kymer* (10).

Judgment.

MALINS, V.C.:—

In this case there is no precatory trust, for there is not a definite gift over as there was in *Le Marchant* v. *Le Marchant*, and there is no obligation here for the widow to possess anything at her death. In order to create a trust which can be carried into execution there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can be no trust affecting it. This is the principle on which all the cases cited from *Attorney-General* v. *Hall* to *Cowman* v. *Harrison* proceed. The case of *Horwood* v. *West*, cited by the other side, is really in accordance with the other cases, for there the testator's widow was, in the opinion of the Court, bound to give all that the testator left her to the children after her decease. In *Breton* v. *Mockett* (11),

(1) Fitzgib. 314.
(2) 2 My. & K. 197.
(3) 2 Cox, 349.
(4) 1 Bro. C. C. 179.
(5) Law Rep. 18 Eq. 152.
(6) 10 Hare, 234.
(7) 1 S. & S. 387.
(8) Law Rep. 18 Eq. 414.
(9) 5 Sim. 138; 2 My. & K. 138.
(10) 7 Ch. D. 181.
(11) *Ante*, p. 95.

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lately decided by me, I held that where consumable articles were given to a widow for life, but without any obligation to keep them in repair, and so that she should not account for depreciation, there could be no gift over, but she took the absolute interest. So here I decide that the children take no interest, and the demurrer must be allowed.

Solicitors for all parties: *Clarke, Woodcock, & Ryland.*

V.-C. M. 1878 *June* 29.

LAWES *v.* LAWES.

[1876 L. 135.]

Partnership Accounts—Variation of Articles—Money Interests not altered.

By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady Day and Michaelmas, and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the accounts should be settled once a year only, viz., at Michaelmas:—

Held, that this variation in the partnership articles did not affect the money interests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March.

Statement.

THIS was an adjourned summons on the part of the Plaintiff, the representative of *Thomas Lawes*, the testator, that the Defendants, *Thomas Lawes* and *J. E. Randell*, the surviving partners of the testator, might be ordered to take the partnership accounts up to the 25th of March, 1876, last preceding the death of the testator, which took place on the 20th of May, 1876.

The testator, *Thomas Lawes*, and *J. E. Randell* and the Defendant *Thomas Lawes*, entered into partnership in March, 1872, and partnership articles were then executed by them. The 28th of such articles provided that the partners should within one week from the 25th of March and the 29th of September in each year adjust all the accounts of the partnership, and make a rest or settlement of the same, to be signed and agreed to by the several partners in manner therein prescribed. And by the 31st article

it was provided that in case the retirement or death of any partner should occur after the 29th of September then next (1872), that his share and interest in the partnership should be taken at the amount or sum which according to the then last half-yearly rest taken or to be taken should appear to have represented his share with interest and additions therein provided for; and by the same deed it was agreed that the partnership should be deemed to have commenced on the 30th of September, 1871.

Statement.

The first settlement of accounts between the partners was made up to the 29th of September, 1872, but after that it was agreed between them that it would be more convenient to have such settlement made up on the 29th of September only in every year, and accordingly the rests or settlements were made up year by year to the 29th of September, 1875. *Thomas Lawes*, sen., who was the father of *Thomas Lawes* the Defendant, died on the 20th of May, 1876, and a suit was instituted for the administration of his estate.

A question was now raised as to how the interest of *Thomas Lawes* the elder in the business was to be ascertained. The surviving partners, *J. E. Randell* and *Thomas Lawes* the younger, contending that the interest of the deceased partner was to be taken at the sum appearing in the balance-sheet taken up to the 29th day of September, 1875, previous to his death, with interest and additions provided to be added thereto by the deed of partnership; and the Plaintiff in the suit for the administration of *Thomas Lawes'*, the deceased, estate, contending that the estate was entitled to a share of the profits up to the 25th of March last preceding his death; or up to the 20th of May when he died, on the ground that no balance-sheet was taken up to the said 25th of March.

Argument.

Higgins, Q.C., and *C. Browne*, for the representatives of the deceased partner:—

The articles of partnership are binding upon the partners, and though for convenience they might have agreed to take the accounts only once a year, that did not affect their interest in the share of the profits secured by the articles. There is no evidence of anything but a parol agreement, and that is not sufficient to

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alter the strict terms of the partnership deed. The clause as to taking the half-yearly rests must either be acted upon strictly or struck out altogether, and if struck out, then the parties will be put upon their common law rights, and will be entitled to share in the profits up to the day of the death of a partner.

Glasse, Q.C., and *Alexander* and *Colt*, for the surviving partners:—

The claim made by the Plaintiffs to share in the profits of the business up to the 20th of May, 1876, the day of the death of *Thomas Lawes* the elder, cannot be supported, for their testator's estate cannot be entitled, in any view of the case, to share in profits made after the 25th of March, 1876; but we submit that the executors are only entitled to the amount of their testator's share as appearing by the balance-sheet taken on the 29th of September, 1875.

It is clear that any provision or clause in a deed of partnership may be varied with the consent of all the partners, and there is evidence here to shew that all the partners agreed that their accounts should be taken, not half-yearly, but once a year only—on the 29th of September. It is stated in Mr. Justice *Lindley's* book (1): "Any article, however express, is capable of being abandoned by the consent of all the partners; and this consent may be evidenced not only by express words but by conduct." This principle was acted on by Lord *Eldon* in *Jackson* v. *Sedgwick* (2), where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner his representatives should be paid an allowance instead of profits. The same principle guided the decisions in *Pettyt* v. *Janeson* (3) and *Simmons* v. *Leonard* (4).

Higgins, in reply.

Judgment.

MALINS, V.C.:—

If the argument on behalf of the surviving partners is correct, then the share of the testator who died in May, 1876, would have to be ascertained as of the 29th of September, 1875, because that

(1) 4th Ed. p. 820.
(2) 1 Sw. 460.
(3) 6 Madd. 146.
(4) 3 Hare, 581.

was the last rest or settlement of the partnership accounts; and although there might have been much larger profits made during the eight months from September to May, still the deceased partner's estate would only be entitled to the third part of the profits realized up to September, which appears to have amounted to £1500. But if, on the other hand, the contention of the Plaintiffs is right, then they would be entitled to a third of the profits up to the 25th of March previous to the death of *Thomas Lawes* the elder. It is contended for the surviving partners that the articles of partnership were varied by the mutual agreement of the partners to the effect that the rests or settlements of account were to be taken once a year only, that is, at Michaelmas, and that consequently the articles must be read as if they contained a clause for taking the accounts only once a year; but it appears to me that although, for convenience, it was agreed that the settlements should be made but once a year, still it never suggested itself to the mind of any of the partners that the effect of that alteration in the mode of taking the rests might be to deprive a partner dying eight months after the last settlement, of his fair share of the profits for the last half year. The argument goes to this, that if the deceased partner had died on the 27th of September he would then be deprived of his share of the profits for a whole year, and would be thrown back upon his share of the £1500. I am bound to come to the conclusion that before a man agrees to vary a contract which should have such an effect as this, it must be clearly shewn that his intention was not only that the accounts should be taken yearly, but that his money interest should be ascertained only once a year. I am satisfied that there never was any such intention, and that the matter rests on a principle which is beyond doubt.

Now, therefore, I think the case of the Defendants fails in this material respect, that there is nothing to shew that *Thomas Lawes* the elder, or either of the other partners, intended to do anything to vary their financial arrangement or to alter their interests as defined by the partnership articles. If the articles are binding altogether, then the accounts must be taken half-yearly, and as the partners agreed to take half-yearly accounts, that which they agreed to do must be considered as done, and the continuing

V.-C. M. 1878 LAWES v. LAWES. Judgment.

partners must have their accounts taken and a settlement made up to the 25th of March last preceding the day of the testator's death.

If the effect of the communications between the parties was to supersede the strict terms of the articles, then I agree that the clause would be superseded altogether, and that could not be done by a parol agreement; but if the clause were omitted, then it would be like an ordinary partnership, and the accounts would have to be taken up to the death of the partner.

I think the rights of the partners are clear, and that the accounts must be taken under the terms of the articles of partnership up to the 25th of March, which was the last half year of the partnership before the death of *Thomas Lawes* the elder.

Glasse, Q.C.:—The parties have arranged, in consideration of the decision of the Court being in favour of the Plaintiff's contention, that it will be more convenient to have the settlement of accounts up to the death of the deceased partner, and as the case raised a proper question for argument, it has been arranged that the costs of both parties should come out of the estate.

MALINS, V.C.:—

That is a very proper arrangement. Therefore let it be declared that the partnership accounts ought to be taken up to the 25th of March preceding the death of the deceased partner, but by consent let them be taken up to the 20th of May, 1876; and let the costs of all parties be paid out of the estate.

Solicitors for Plaintiff: *Surr, Gribble, & Bunton.*
Solicitors for Defendants: *Blake & Snow; Turner & Son.*

BESLEY *v.* BESLEY.

V.-C. M.

1878

July 6, 13.

[1878 B. 27.]

Lessor and Lessee—Error in Terms of Lease—Claim for Compensation—Rule of Caveat Emptor.

By a contract in 1861, *A.* agreed to grant an underlease to *B.* of certain premises, for the residue of the term held by *A.*, except the last ten days, such underlease to contain similar clauses and covenants to those contained in the original lease. In pursuance of this contract an underlease was prepared by the lessor's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the original lease nor employed any professional adviser. In 1877 it was discovered that the original lease had only sixteen years to run, and the underlease had, by mistake, been made for seven years longer than the lessor had power to grant. The lessee claimed compensation:—

Held, that the lessee was to blame in not inspecting the original lease and ascertaining for himself the precise term, and that *caveat emptor* applied.

13 Ch D 131
— 529 539
541
19 Ch D 178
11 Q B D 263
12 Q B D 317

Statement.

THIS action was for the administration of the estate of Alderman *Besley*, in which a claim was made by Sir *Charles Reed* and the representatives of *Benjamin Fox*, deceased, under the following circumstances:—

By an agreement dated the 16th of July, 1861, Alderman *Besley* agreed to sell, and Sir *Charles Reed* and *B. Fox* agreed to purchase the business of a type-founder, then carried on by Alderman *Besley* in *Fann Street*, in the city of *London*, together with the stock-in-trade, for the sum of £10,000; and it was agreed, amongst other things, that an underlease should be granted by *Besley* to *Reed & Fox* of the premises in *Fann Street*, then occupied by Alderman *Besley*, from the 1st of January then next for the residue of the term for which Alderman *Besley* held the same, except the last ten days thereof, at the yearly rent of £225, such lease to contain similar clauses and covenants to those contained in the lease under which the said *R. Besley* held the premises, and *Charles Reed* and *Benjamin Fox* should execute a counterpart of such underlease without requiring any evidence in support of the title of *R. Besley*, and that *R. Besley* would procure to be granted to *C. Reed* and *B. Fox* a lease of the premises in the *Vine Yard*, then occupied by him at the existing rent.

V.-C. M. 1878 BESLEY v. BESLEY. Statement.

By an indenture of underlease dated the 1st of January, 1862, *R. Besley* demised the *Fann Street* premises to *C. Reed* and *B. Fox* for a term of twenty-three years less ten days from the 25th of December, 1861, at an annual rent of £225 per annum; and the said underlease contained a covenant by *R. Besley* that *C. Reed* and *B. Fox*, their executors or administrators, paying the rent and performing the covenants contained therein, should and lawfully might peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said premises thereby demised, with their and every of their appurtenances during the term thereby granted without any lawful let, suit, trouble, hindrance, or interruption whatsoever, from or by the said *R. Besley*, his executors, administrators, or assigns, or any other person or persons claiming or to claim by, from, or under him, them, or any of them.

At the time of the execution of such underlease *R. Besley* held a lease of the premises comprised therein for a term of sixteen years only, and expiring at Christmas, 1877. Consequently the lease granted by *Besley* to *Reed & Fox* exceeded by seven years the term which he had power to underlet. This was admitted to have been a mistake mutual to both parties, and was not done intentionally. The underlease was prepared by *R. Besley's* solicitors, and no solicitor was employed by *C. Reed* and *B. Fox*.

After the death of *R. Besley* a notice was sent by his solicitor to *C. Reed* (his partner, *B. Fox*, having previously died), informing him of the mistake in the underlease, that the superior landlord required possession, and requiring him to give up possession of the premises at Christmas, 1877. Sir *C. Reed* was then obliged, in consequence of the requirements of his business, to procure a lease of the *Fann Street* premises from the superior landlord for a term of seven years, and as property in that neighbourhood had increased in value he had to pay a rent of £400 instead of £225. He then brought in the present claim against the estate of *R. Besley* for £1225, being the aggregate of £175 a year, the difference in the rent now payable for the premises from Christmas, 1877, to Christmas, 1884.

Argument.

Bristowe, Q.C., and *Crossley*, for the claimants:—

Our claim is for the amount which it has cost us to make good

the loss we have sustained by the misrepresentation of the Defendant's agent. We trusted to the statement made by *Besley's* solicitor, who ought to have known the length of the lease. It was he who prepared the underlease, and to do that he must have had the original lease before him. It may be admitted that the error was not intentional. We do not allege that it was fraudulent, but the effect is the same. Our claim is in conformity with the decision in *Burrowes* v. *Lock* (1), where the Master of the Rolls said the Plaintiff must first make out "that the fact as represented is false, and secondly, that the person making the representation had a knowledge of a fact contrary to it. The Plaintiff cannot dive into the secret recesses of his heart, so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it, at least it was gross negligence to take upon him to aver positively and distinctly that *Cartwright* was entitled to the whole fund." This is exactly the same here. There was a similar decision in *Slim* v. *Croucher* (2), where it was not shewn that there was any fraud, but that there had been forgetfulness, and the Court ordered repayment of money which had been lent upon a false representation of facts. So in *Cooper* v. *Phibbs* (3) an agreement had been made in mutual mistake, but the Plaintiff, though there was no fraud, was held entitled to have it set aside. In *Barwick* v. *English Joint Stock Bank* (4), it was held that a principal is liable for the fraudulent misrepresentation of his agent acting in the course of his business; and that no sensible distinction could be drawn between the case of fraud and the case of any other wrong. Where one party has suffered, and another has profited by the fraudulent representation of an agent of the latter, made within the scope of his authority, the former is entitled to recover damages: *Mackay* v. *Commercial Bank of New Brunswick* (5). If a lease is executed upon terms materially different from those agreed upon, and contrary to the intention of both parties, a Court of Equity may cause it to be reformed and corrected or set aside: *Earl of Bradford* v. *Earl of Romney* (6); *Garrard* v. *Frankel* (7).

(1) 10 Ves. 470, 476.
(2) 1 D. F. & J. 518.
(3) Law Rep. 2 H. L. 149.
(4) Law Rep. 2 Ex. 259.
(5) Ibid. 5 P. C. 394.
(6) 30 Beav. 431.
(7) 30 Beav. 445.

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We also contend that we are entitled to compensation by reason of the lessor having committed a breach of his covenant for quiet enjoyment contained in the lease, the covenant for quiet enjoyment extends to all lawful interruptions and disturbances by any person or persons whomsoever during the continuance of the term: *Spencer* v. *Marriott* (1); but notwithstanding that covenant the lessor gave us notice to quit at the expiration of sixteen years instead of twenty-three years.

Glasse, Q.C., and *Eyre*, for the representatives of the estate of *R. Besley*:—

The claimants had special notice by the terms of the contract for the purchase of Alderman *Besley's* business of the existence of the lease under which he held the premises. They were to take an underlease for the residue of the term less ten days, and such underlease was to contain the same covenants and conditions as were contained in the original lease. They ought, therefore, to have protected themselves either by asking for production of the lease for inspection, or by employing independent professional advice and assistance, when doubtless the error would have been discovered. The claimants therefore have only themselves to blame, and cannot take advantage of their own laches. Moreover, it is now seventeen years since the underlease was granted, and it is too late to bring this claim.

This is a case in which the rule *caveat emptor* distinctly applies. A lessee is a purchaser, and cannot under any circumstances recover compensation after the conveyance is executed; that was laid down by your Lordship in the recent case of *Manson* v. *Thacker* (2), and the principle is established by many cases commented upon in Lord *St. Leonards'* Vendors and Purchasers (3), and in the Concise View (4), and also in *Woodfall's* Landlord and Tenant (5). The case of *Okill* v. *Whittaker* (6) is precisely the same as this, except that the lessor granted a less term than he had in the premises, and sought to make the lessee a trustee for him for the residue of the term, but the bill was dismissed. The

(1) 1 B. & C. 457.
(2) 7 Ch. D. 620.
(3) 14th Ed. p. 811.
(4) Page 252.
(5) 11th Ed. pp. 629, 636.
(6) 2 Ph. 338.

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lessee must at his peril ascertain that the intended lessor has sufficient title to demise for the proposed term: *Stanley* v. *Hayes* (1). Then as to the argument in respect of the covenant for quiet enjoyment, there was no breach of the covenant by the lessor; it was the superior landlord who gave notice, not *Besley*. *Besley's* agent only forwarded the notice, and as *Reed & Fox* had bound themselves by the covenants in the original lease they were bound to quit the tenancy at the expiration of the lease.

Snape, for the executors of Alderman *Besley*, took no part in the argument.

Bristowe, in reply.

Judgment.

MALINS, V.C.:—

This is a claim against the estate of the late Alderman *Besley* for £1225 on account of misrepresentations said to have been made in carrying into effect a contract between Alderman *Besley* and Sir *C. Reed* and Mr. *B. Fox*, dated the 16th of July, 1861. The contract contained this stipulation, that Messrs. *Reed & Fox* should accept an underlease of the premises in which the business was carried on for the residue of the term assigned to Alderman *Besley*, less ten days, at the yearly rent of £225, and the underlease was to contain similar covenants to those in the original lease to Alderman *Besley*. The rights of the parties must depend upon this contract. Nothing can be more clear than that *Reed & Fox* by this contract bound themselves to take a lease of the premises for the residue of the term for which *Besley* held it, less ten days. If they had employed a solicitor, which they did not, or if they had inspected the original lease, they would have found out at once the extent of time for which it was granted to *Besley*, but this they did not do. It is quite clear that if the residue of the term had only been two years, *Reed & Fox* would still have been bound to take that term. It seems that *Reed & Fox* elected to be their own lawyers in the transaction, but they could not on that account place the lessor in a worse position than if they had employed a professional man. If they chose to take the lease with-

(1) 3 Q. B. 105.

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out investigating the title they must suffer for it. There was no fraud or unfairness in the matter, but an accidental mistake occurred. The solicitor, Mr. *Micklem*, who managed the business, entrusted it to a clerk, who told him that the residue of the term was for twenty-three years, while in fact it was only a sixteen years term. The underlease, therefore, was granted to *Reed & Fox*, to have and to hold the premises for the term of twenty-three years, less ten days, which would have expired in the year 1884. But in 1877 it was discovered that a mistake had been made, and that the lease would expire at Christmas, 1877, the consequence of which was that *Besley's* representatives were bound to give up the premises at that date, and as *Reed & Fox* had undertaken to be bound by the covenants which were contained in the lease to *Besley*, it followed that they must give up the premises at Christmas, 1877.

Now as by the terms of the underlease Messrs. *Reed & Fox* were led to believe that they held a lease of the premises till the year 1884, it was, of course, very disagreeable for them to turn out at so short a notice, and as they could not get a renewal of the lease upon the same terms, in consequence of the rise in the value of the property, and as it was very important they should continue their business in the same premises, they were obliged to obtain a new lease at a rental of £400, which was £175 a year above what they were previously paying.

When this matter was before me in Chambers, finding the respectability of the parties, and seeing that the difficulty had arisen from a mutual mistake, that is, that *Besley's* solicitor had mistaken the period for which the lease was held, and that *Reed & Fox* had made a mistake in not employing a solicitor and not inspecting the original lease, I made a suggestion that they should come to an arrangement, and my idea was that the justice of the case would be met by the loss being divided between the parties, each paying half of the increased rent. Sir *C. Reed* was willing to accede to this proposal, and was ready to sacrifice half the loss, but the proposal was resisted by the other side, and it devolves upon me now to decide the rights of the parties according to the strict principles of law.

Now, if this error had been discovered before the execution of

the lease—that is, if *Reed & Fox*, who were to be bound by the covenants in the original lease, had called for the production of it to satisfy themselves of the terms of the covenants, as it was their duty to do, and had then found out what was the exact period for which the lease was held—I think they would have been justified in claiming compensation, or possibly in rescinding the contract; but, as a matter of fact, *Reed & Fox* gave up their right to inspect the original lease, and took *Micklem's* word in regard to the contents of that lease, and having executed the contract and bound themselves to take the residue of the term and to be bound by the covenants, they could not object to any covenants, however onerous they might be; they, in fact, bound themselves by covenants in a deed which they had not seen.

Under these circumstances, what are the rights of the parties? It has been laid down as a rule that a purchaser must be wise in time, and it is quite immaterial whether the rule is applied to a purchaser for valuable consideration or to a lessee, because a lessee is a purchaser for value, and is equally bound to look into the facts connected with the subject of the lease as a purchaser is to look into the matters connected with his purchase. That is clearly shewn by the case of *Legg* v. *Croker* (1); and Lord *St. Leonards*, in his Vendors and Purchasers (2), says that a purchaser cannot recover his purchase-money after the conveyance is executed, either at law or in equity.

Then the case of *Okill* v. *Whittaker* (3) was this. Premises were sold for the residue of a term, of which both parties supposed that eight years only were unexpired, and the price was fixed on that supposition, but it afterwards turned out that twenty years were in fact unexpired at the time of the sale. A bill filed by the vendor to make the purchaser a trustee for the vendor for the remainder of the term was dismissed.

Now, therefore, this is a case of mutual mistake, because if *Micklem* had known he was misstating the term of the lease, it would have been a fraudulent act on his part, and fraud vitiates every transaction. No fraud is alleged here, and therefore it could be nothing more than an innocent mistake. I know of no

(1) 1 Ball. & B. 506. (2) 14th Ed. p. 549.
(3) 2 Ph. 338; 1 De G. & Sm. 83.

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instance where a purchase has been completed for many years in which the purchaser has got compensation for a defect of title when he has had ample opportunity of rectifying it.

Manson v. *Thacker* (1) was a case in which I decided that a purchaser could not, in the absence of fraud, obtain compensation for a misrepresentation in the subject-matter of the purchase after execution of the conveyance, where the purchaser had had the opportunity of examining the property and discovering the defect.

Therefore, I think on every principle, independently of the covenant for quiet enjoyment in the lease, that *Reed & Fox* bound themselves to accept the title, and if they had any claim against *Besley* they should have raised the question before they completed the contract, and the Court cannot now interfere. It was their own fault for taking on themselves the responsibility of acting as their own lawyers. I should have been glad under the circumstances if it could have been arranged as I suggested in Chambers, but that not having been done, I cannot help coming to the conclusion I do, that the terms of the contract must be carried into effect.

Then Mr. *Bristowe* relied upon the covenant for quiet enjoyment, and it was argued that the lessor in contravention of that covenant gave notice to the lessee to terminate the lease at the expiration of sixteen years instead of twenty-three years, which was the period for which he was to have quiet enjoyment of the property; but in fact, although the notice was sent by the agent of the lessor, it was in consequence of the claim made by the superior landlord and not in consequence of any hindrance or interruption on the part of the lessor contrary to the terms of the covenant for quiet enjoyment.

It appears that the landlord gave notice to the representatives of Alderman *Besley* that the premises would have to be given up at Christmas, 1875, and *Micklem*, having then looked into the lease and discovered the mistake which had been made, wrote in February, 1877, to Sir *Charles Reed*, informing him of the notice by the landlord, and that the lease in fact terminated in December, 1877. Therefore it was not an eviction by *Besley*, but an intima-

(1) 7 Ch. D. 620.

tion that the superior landlord had given notice. The case of *Spencer* v. *Marriott* (1) is conclusive upon that subject. In that case there was a covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, or eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held under a lease for a longer term which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The underlessee was not informed of this clause, and underlet to a tenant, who incurred a forfeiture by using the premises for a shop, and the original lessor evicted him. It was there held that this was not an eviction by means of the lessor within the meaning of the covenant in the underlease.

All the cases in *Woodfall* proceed upon the same principle, that a purchaser must at his peril ascertain that the intended lessor has sufficient title to demise for the proposed term.

Under all the circumstances, being of opinion that the difficulty arose from an innocent mistake mutual to both parties, I come to the conclusion that Messrs. *Reed & Fox* cannot be entitled to recover after so long a period.

I have pointed out that they would have been obliged to take the lease even if it had been for only two years, that is, that the contract having been that they should take the residue of the lease, they would have been bound to take the residue whatever the term might have been; and I have also said that they could not be entitled to claim compensation as soon as the contract was completed; how, then, could they claim compensation after a lapse of seventeen years?

I can only come to the conclusion that the claim fails, and must be disallowed.

Glasse, Q.C., asked for the costs occasioned by the adjournment into Court, but said that the Defendants were willing to waive any claim for the costs of the proceedings in Chambers.

MALINS, V.C.:—

I am not inclined to hold out any encouragement to persons who claim compensation after so many years. Therefore the

(1) 1 B. & C. 457.

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claimants must pay the costs of adjournment into Court; but by consent there will be no costs of the proceedings in Chambers.

Solicitors for Claimants: *Carr, Bannister, Davidson, & Morriss.*
Solicitors for Representatives of *Besley: Arkcoll, Jones, & Cockell.*
Solicitors for Executors: *De Jersey, Micklem & Son.*

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In re WEDDERBURN'S TRUSTS.

Trustees—Powers of Investment—23 & 24 Vict. c. 38, *s.* 11.

Trustees of settlements coming within the operation of *Lord St. Leonards' Act*, 1860 (23 & 24 Vict. c. 38), may invest the trust funds in any securities in which cash under the control of the Court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust.

Statement.

BY a marriage settlement made in 1843, certain lands, hereditaments, and sums of money were settled in trust for *John Wedderburn* for life, with remainder (subject to provision thereby made for *Charlotte Wedderburn* during her life) for the children of the marriage. And it was provided that the trustees might sell and dispose of the settled funds, and lay out and invest the proceeds "in or upon any other Government or Parliamentary stocks or funds of *Great Britain*, and none other than Government or Parliamentary," and to vary investments, "provided always that such investment be made in none other than Government or Parliamentary securities of *Great Britain*."

There had been issue of the marriage two daughters only, who were both married, and in their marriage settlements a power was contained to invest upon Government or real securities.

The opinion and direction of the Court was now asked whether the trustees of the settlement of 1843 might properly invest the funds comprised in that settlement in any securities in or upon which cash under the control of the Court might be invested under the 11th section of *Lord St. Leonards' Act*, 1860 (23 & 24 Vict. c. 38, s. 11), or whether they were confined to Government or Parliamentary stocks or funds, which would exclude the power to invest in real security.

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Macnaghten, for the Petitioners:—

Argument.

Lord *St. Leonards'* first Act of 1859 (22 & 23 Vict. c. 35), s. 32, provided that trustees might invest on certain securities including real securities, "where they should not by the instrument creating the trust be expressly forbidden" to do so. This settlement does prohibit all securities except Government securities. But 23 & 24 Vict. c. 38, s. 11, provides that trustees may invest in the stocks in which cash under the control of the Court may be invested, and contains no such exception.

C. C. Tucker, for the Respondents.

MALINS, V.C.:—

Judgment.

I think that as the statutory power is without any exception the trustees may invest in any stocks in which cash under the control of the Court may be invested, notwithstanding the prohibitive words in the settlement.

Solicitors: *Freshfields & Williams.*

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1878
July 24.

[1878 B. 320.]

Voluntary Settlement—Declaration of Trust.

A husband by deed-poll recited as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman," several leasehold houses and the ground-rents thereof.

The deed was voluntary:—

Held, that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust.

Statement.

ON the 30th of April, 1872, *John Baddeley* executed a deed-poll, of which the material part was as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled, now in consideration of my love and affection for my wife

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I do hereby settle, assign, transfer, and set over unto my said wife *Eliza Baddeley* as though she were a single woman, her executors, administrators, and assigns, all that my share in [certain specified houses and ground-rents in *Middlesex*] as though she were now a *feme sole* and unmarried, and in accordance with the spirit and intention of the recent Act of Parliament entitled the *Married Women's Property Act*, 1870."

This deed was duly registered in the *Middlesex* Registry, and Mrs. *Baddeley* entered into the receipt of the rents.

Mrs. *Baddeley* claimed a declaration that the deed-poll operated as a valid assignment, and a demurrer to the claim was put in on behalf of Mr. *Baddeley's* legal personal representatives.

Argument.

J. Pearson, Q.C., and *Gregory*, for the legal personal representatives:—

There can be no possession of a wife separate from her husband: *Roe* v. *Wilkins* (1); therefore the assignment to the wife was invalid: *Moyse* v. *Gyles* (2); and as an assignment was intended, the voluntary gift is void: *Richards* v. *Delbridge* (3). The testator had no intention of constituting a trust: *Moore* v. *Moore* (4); *Milroy* v. *Lord* (5); *Warriner* v. *Rogers* (6).

Glasse, Q.C., and *Methold*, for the widow:—

The word "settle" points to a declaration of trust, which is not the less good because the word "assign" is used in addition.

There is a valid declaration of trust, as in *Grant* v. *Grant* (7); *Mews* v. *Mews* (8); *Lucas* v. *Lucas* (9); *Richardson* v. *Richardson* (10); *Morgan* v. *Malleson* (11). The wife took possession under the deed, which supports the gift: *Walter* v. *Hodge* (12). The husband has shewn his intention that the wife shall have the property, as in *Ashworth* v. *Outram* (13). The wife took subject

(1) 4 A. & E. 86.
(2) 2 Vern. 385.
(3) Law Rep. 18 Eq. 11.
(4) Ibid. 474.
(5) 4 D. F. & J. 264.
(6) Law Rep. 16 Eq. 340.
(7) 34 Beav. 623.
(8) 15 Beav. 529.
(9) 1 Atk. 270.
(10) Law Rep. 3 Eq. 686.
(11) Ibid. 10 Eq. 475.
(12) 2 Sw. 92, 106.
(13) 5 Ch. D. 923.

to the rent, which prevents the deed being voluntary: *Price* v. *Jenkins* (1).

J. Pearson, in reply.

MALINS, V.C.:—

No one can doubt that the husband's intention here was to give his wife the leasehold property; but it is contended that the deed was intended to be an assignment, and is therefore inoperative as between husband and wife. No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife, and she entered into possession, an act which I construe, not as an attempt to take possession adversely to her husband, which could not be done, as is shewn by *Roe* v. *Wilkins* (2), but as a taking possession of her separate property under the trust. The husband was no doubt mistaken in thinking he could make this gift by way of assignment, but there is enough in the deed to make it operate as a declaration of trust which the Court ought to carry into effect. The law on this subject is correctly stated in *Grant* v. *Grant* (3); and I am not disposed to disagree with *Richardson* v. *Richardson* (4) and *Morgan* v. *Malleson* (5), notwithstanding the remarks of Sir *G. Jessel* in *Richards* v. *Delbridge* (6). I therefore declare that there is a trust properly constituted in favour of Mrs. *Baddeley*.

Solicitors: *Thomas Baddeley & Sons.*

(1) 5 Ch. D. 619.
(2) 4 A. & E. 86.
(3) 34 Beav. 623, 625.
(4) Law Rep. 3 Eq. 686.
(5) Ibid. 10 Eq. 475.
(6) Ibid. 18 Eq. 11.

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1878
July 12, 26.

In re ADAMS' SETTLED ESTATES.

Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 16—*Sale out of Court.*

A sale out of Court may be directed under the *Settled Estates Act*, 1877, the purchase-money being brought into Court; and such a sale may be authorized to be made by public auction or private contract, subject to a reserved price to be fixed by the Judge in Chambers.

Statement.

THIS was a petition for the sale, under the *Settled Estates Act*, 1877, of certain land settled by the will, dated in 1853, of *Edward Richard Adams.*

The Petitioners were three legal tenants for life, one of whom was entitled in possession, and the other two in reversion; and the Respondents were infants legally entitled in remainder.

The property proposed to be sold was situated at *Beckenham*, and was known as *Elmer's End Farm.* It contained sixty-five acres, and was let as agricultural land at a rent of £130. There was evidence that the property was near a railway station, that some of the neighbouring land was built over, and that it would probably fetch, if sold by auction, a sum sufficient to produce very much more than the present income.

Argument.

Charles Mitchell, for the Petitioners:—

This petition has unavoidably stood over for some weeks, and there would now be great difficulty in getting through the sale in Chambers before the Long Vacation; the Petitioners therefore ask that they may be authorized, as trustees, to sell out of Court. An order for a sale out of Court was made by your Lordship last week in a case of *In re Andrews' Settled Estate.* It appears that a beneficial offer has been made for the purchase of part of the land, and it would, therefore, be very desirable if permission were given for a sale by public auction or private contract.

Marsden, for the infant Respondents.

Judgment.

MALINS, V.C.:—

I will make the order for sale of the property out of Court, but the purchase-money must be brought into Court, as in *In re*

Andrews' Settled Estate. The order may also be for sale by public auction or private contract, but subject to a reserved price to be fixed in Chambers.

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July 26. The matter was again mentioned to the Vice-Chancellor, at the Registrar's request, and his Lordship directed the order to be drawn up.

Solicitors: *Radcliffe, Cator, & Martineau.*

In re SMITH'S TRUSTS.

V.-C. M. 1878 *July* 27.

Construction of Will—Bequest to Five Daughters—Personæ designatæ.

A testatrix bequeathed the residue of her property to be equally divided between the five daughters of *Samuel* and *Mary L.* for their own use:—

Held, that this was a bequest to the five daughters as *personæ designatæ*, and not as a class.

Statement.

THE will of *Jenet Smith*, a widow, dated in April, 1804, contained the following clause: "All the rest, residue, and remainder of my effects whatsoever I die possessed of I give and bequeath to my friend *Catherine Smith* for her own private use during her life, and to her children should she have any, but should she have no children, I then leave to *Jane Emma Lichigaray* £1000, to be paid for the use of the said *Jane E. Lichigaray*, and all the rest of my property to be equally divided between the five daughters of *Samuel* and *Mary Lichigaray* for their own use after the death of the said *Caroline Smith*, she leaving no children;" and there was this further direction: "no one is to have anything to do with this my will but the said *Catherine Smith*. I wish her to appoint someone as trustee, that in case of her death the children may have a proper person to be their guardian."

Samuel Lichigaray and *Mary* his wife, at the date of the will of *Jenet Smith*, had five children, all of whom were daughters, namely, *Mary*, *Catherine*, *Caroline*, *Louisa*, and *Jane Lichigaray*. Two of the daughters, *Catherine* and *Caroline*, predeceased the testatrix, who knew of their deaths. The testatrix died in January,

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Statement.

1814. *Catherine Smith* died in 1839, a widow, without ever having had a child. After the death of *Catherine Smith* the legal personal representatives of *Jenet Smith* got in and realized her residuary estate, and having paid three-fifth parts to the three daughters of *Samuel* and *Mary Lichigaray* who survived *Jenet Smith*, the remaining two-fifths were paid into Court, but no claim had been made in respect thereof by the representatives of the three children who survived *Jenet Smith*, or by the next of kin of *Jenet Smith* or any other person, and such two-fifths with the accumulations were now represented by a sum of £4640 reduced annuities.

The petition was presented by the personal representatives of the three children who survived *Jenet Smith*, each claiming to be entitled to a third part of the fund in Court.

Argument.

Glasse, Q.C., and *Hunter*, for the Petitioners:—

The question is whether, under the words of this will, the bequest to the five daughters of *Samuel* and *Mary Lichigaray* is a bequest to them as *personæ designatæ* or as a class. In the first place the testatrix gives the residue of her estate to *Caroline Smith's* children generally, that is, to a class of persons, and it may fairly be presumed that the intention was that both sets of legatees should take as a class. This was the case in *Doe* v. *Sheffield* (1). This particular bequest is to the five daughters of *Samuel* and *Mary Lichigaray*. The current of authorities has been in favour of such words as these constituting a class, though there is no case in which precisely the same expression has been used. In *Knight* v. *Gould* (2) Lord *Brougham* decided in a case where there was a bequest of residue "to my executors hereinafter named equally between them," followed by the appointment of three executors, that the share of one executor who died before the testator went to the two survivors.

The case of *Viner* v. *Francis* (3) is distinctly an authority for holding that this is a gift to a class, and so are the cases of *Martin* v. *Wilson* (4), *Shuttleworth* v. *Greaves* (5), and *Barber* v. *Barber* (6),

(1) 13 East, 526.
(2) 2 My. & K. 295.
(3) 2 Cox, 190.
(4) 3 Bro. C. C. 324.
(5) 4 My. & Cr. 38.
(6) 3 My. & Cr. 688.

and these cases have been established by the recent decision in *Dimond* v. *Bostock* (1), where your Lordship's opinion was affirmed on appeal. There the gift was "to all the nephews and nieces of my late husband except *A.* and *B.*," and that was held to be a gift to a class. It is impossible to distinguish that case from the present. There were five nephews and nieces including *A.* and *B.*, and that was as clearly a gift to the other three *nominatim* as it is here to the five daughters; and the case of *Lord Bindon* v. *Earl of Suffolk* (2) was equally strong, where the gift was "to my five grandchildren equally between them, or such as should survive."

W. Cooper, for the legal personal representatives of *Jenet Smith*, was not called upon.

MALINS, V.C.:— Judgment.

I have no doubt whatever as to what should be my decision in this case. If the testatrix had said "I give all the residue of my property to be divided equally between the daughters of *Samuel* and *Mary Lichigaray*," that would have been a gift to a class, and if there had been twenty daughters they would all have taken a share; that is to say, a bequest to a class takes in all who survive the person at whose death the property is to be divided. This is settled by cases like *Doe* v. *Sheffield* (3), *Lee* v. *Pain* (4), and *Leigh* v. *Leigh* (5). But here the gift is to the five daughters of *Samuel* and *Mary Lichigaray*. It is clear, therefore, that if a sixth daughter had been born she could not have taken under the bequest. Then why did the testatrix say five daughters? The answer is that she knew there were only five, and she intended to limit the gift to those who were in existence as tenants in common. It happened that two of the five died in the lifetime of the testatrix; if it had been a gift to the daughters simply, then the three surviving daughters, being only members of a class, would have taken the whole. Suppose the testatrix had named the five daughters, could anyone have doubted that they would have been

(1) Law Rep. 10 Ch. 358.
(2) 1 P. Wms. 96.
(3) 13 East, 526.
(4) 4 Hare, 250.
(5) 17 Beav. 605.

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tenants in common of the fund, and if one had died could it be possible for the remaining four to take her share? What difference, then, can there be when she says "the five daughters"? It is precisely the same as if she had named them all, and they take as *personæ designatæ*.

If there had been no authority upon the point I should have felt myself bound to come to the conclusion that the word "five" designated the persons who were to take, and they would take as tenants in common, and the shares of the two who died before the testatrix would lapse. But the question is not destitute of authority: there is first the case of *Lord Bindon* v. *Earl of Suffolk* (1); the bequest was to his five grandchildren, share and share alike, equally to be divided between them, and if any of them died, then his share to go to the survivors or survivor of them. There it was held that the grandchildren were tenants in common and not joint tenants, so that if one died his share would go to his executors and not to the survivors. The reasons given were that by the latter words it must have been intended, if any of them should die in the life time of the testator. If it were not for this clause, if any of the grandchildren had died in the life of the testator, that grandchild's fifth part would have been a lapsed legacy and have gone to the executors as undisposed of by the will; but by this bequest over, if it should so happen that any of the grandchildren should die in the lifetime of the testator, such share would go to the survivors. That was exactly the same point as in this case.

Then in *Viner* v. *Francis* (2) the gift was to the children of a deceased sister, and this was held to be a gift to those who were living at the death of the testator, but Sir *L. Kenyon* points out the difference between that case and the case of *Lord Bindon* v. *Earl of Suffolk*, and says there the gift was to the five grandchildren, which shewed that he had particular objects in view.

There is no authority opposed to this view of the case. Mr. *Glasse* says he cannot distinguish this case from the decision in *Dimond* v. *Bostock* (3).

In my mind there is nothing more clear than the distinction between the two cases. In *Dimond* v. *Bostock* the testatrix gave

(1) 1 P. Wms. 96. (2) 2 Cox, 190.
(3) Law Rep. 10 Ch. 358.

personal estate in trust for all the nephews and nieces of her late husband who were living at the time of her decease, except *Everald Richards* and *Ellis Bostock,* in equal shares as tenants in common. When the testatrix's husband died there were nine nephews and nieces besides the nephew and niece who were excepted. It was there held, affirming my decision, that the gift was to a class from whom two were excluded. So if it had been here to all the daughters except two it would have been the same; but it is to the five daughters, which is the same as if they had all been named. The only other case of the least importance is that of *Martin* v. *Wilson* (1). I made a note to this case many years ago in my copy of that volume, that the case of *Martin* v. *Wilson* is opposed to *Viner* v. *Francis* (2); and I think it is obviously an erroneous decision and contrary to every other case. The only authority which could be supposed to bear on this case is *Knight* v. *Gould* (3). In that case there was a bequest of residue "to my executors hereinafter named equally between them," and that was followed by the appointment of three executors, one of whom died in the lifetime of the testatrix. The Master of the Rolls held that the two survivors took the whole, and his decision was affirmed by Lord Chancellor *Brougham.* I think there is no doubt that this decision turned upon the official capacity of the executors, and it has no application to this case.

My opinion therefore is that the five daughters took as *personæ designatæ* and not as a class, and as two died before the testatrix, their shares lapsed.

Solicitor for Petitioner: *A. J. Head.*
Solicitors for Respondents: *Valpy & Co.*

(1) 3 Bro. C. C. 324. (2) 2 Cox, 190.
(3) 2 My. & K. 295.

V.-C. B.
1878
Jan. 11.

PROVIDENT PERMANENT BUILDING SOCIETY *v.* GREENHILL.

[1875 P. 102.]

Mortgage—Building Society—Account—Fines—Interest.

14 CLD 350
—703.
21 CLD 441

Fines secured by covenant in a mortgage to a building society form part of the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest.

The form of foreclosure decree in the case of a mortgage to a building society does not differ from that in the case of an ordinary mortgage.

Statement.

ADJOURNED SUMMONS.

The bill, which was filed by the *Provident Permanent Building Society* as mortgagees, prayed an account of what was due to them for principal, interest, and costs upon their several mortgage securities from the Defendants, the mortgagors, and foreclosure in default of payment.

The several mortgage deeds and memorandums of charge which were secured by deposit of deeds, and collaterally secured by promissory notes, contained covenants by the mortgagors to pay certain monthly sums on the days therein mentioned for certain terms of years, and also all fines and other sums which should, according to the rules and tables of the society, become payable in respect of their shares; and the mortgagors thereby charged certain hereditaments as security for payment to the trustees of the society of the sums covenanted to be paid until all the said principal sums and interest thereon should be fully paid and satisfied.

It was provided by the rules of the society, that if any borrower should be desirous of having his property discharged from the mortgage before the expiration of the term for which his advance was taken, he might do so on giving two months' notice, and on discharging all instalments and fines due in respect thereof, and the present value of the future repayments calculated to the end of the original term, and discounted at the rate therein specified.

In the bill the amount claimed to be due to the society on securities was stated to be "in respect of the said promissory notes and of instalments in arrear, and fines and interest and costs," and

"the present value of the future instalments calculated as provided," &c.

By the decree, dated the 19th of June, 1877, an account was directed of what was due to the Plaintiffs for principal and interest and costs under the several indentures of mortgage and instruments in writing in the pleadings mentioned, and for their costs of the cause to be taxed, &c., with the usual directions for a reconveyance to the Defendants upon payment of the amount certified to be due, and in default of payment, foreclosure.

Statement.

In taking the account in Chambers the question had arisen whether the Plaintiffs were entitled to include in the account as principal the fines payable according to the rules of the society and covenanted to be paid by the Defendants.

This question was adjourned into Court.

Argument.

Kay, Q.C., and *Cozens-Hardy*, for the Plaintiffs, contended that the fines, payment of which was expressly stipulated for in the mortgage deeds, formed part of the principal secured by the mortgages, and as such must be included in taking the account as principal bearing interest.

Waller, Q.C. (*Phear* with him), for the Defendants:—

The decree directs simply an account of what is due for principal, interest, and costs. If it had been intended to include these fines in the account, the decree should have been differently expressed, and framed according to the precedents for the foreclosure of building society mortgages given in *Pemberton* on Judgments (1), where the account is "of all subscriptions, redemption moneys, and other payments due, owing, and payable," &c. The Plaintiffs have not obtained judgment in their favour as to the fines, nor did they ask any account in respect of them in the prayer of their bill; the fines cannot therefore be included in the account of principal.

Judgment.

BACON, V.C.:—

In my opinion there is no kind of question upon this subject. The mortgagee files a bill and gets the ordinary decree which has

(1) 2nd Ed. p. 513.

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PROVIDENT PERMANENT BUILDING SOCIETY v. GREENHILL.
Judgment.

been, according to the established rule of this Court, for principal, interest, and costs under the written contract between the parties, so that in order to ascertain what is principal and interest you have to refer to the written deed. In this case the written deed stipulates that certain fines shall, in certain contingencies, be paid by the mortgagor. These fines became as much principal as the sum originally advanced by way of loan; and that they do so is clear, because interest is provided for by the deed. There can be no kind of question that the whole sum due for principal and fines, which are principal, and any other sum that the terms of the written contract justifies, are to be taken into consideration in taking the account. It may well have been that in the precedent referred to as directing an account of subscriptions and other things, the parties thought it necessary, for some reason, to express those things; but there is not one law for building society mortgagees and another for the rest of the Queen's subjects mortgagees. There is no ground why the fines should not be calculated in the amount due for principal, interest, and costs. The Plaintiff must have the costs of this summons added to the other costs in the suit.

Kay:—Your Lordship's opinion is that the fines are principal, and payable with interest according to the terms of the deed?

BACON, V.C.:—Yes.

Solicitors: *Sharpe, Parkers, & Co.; Prior, Bigg, Church, & Adams.*

RENALS *v.* COWLISHAW.

V.-C. H.

1878

April 10.

[1876 R. 89.]

Restrictive Covenant—Covenantee—Assign of—Right to sue.

The former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the Defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land.

The same vendors afterwards sold the residential estate to the Plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the Plaintiffs' conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned.

In an action by the Plaintiffs, to restrain the Defendants, who had purchased the land first sold as above mentioned with notice of the first-mentioned restrictive covenants, from building in contravention of those covenants:—

Held, that, although the Plaintiffs were "assigns" of the original covenantees, they were not entitled to sue upon the original covenants.

Statement.

BY an indenture dated the 29th of September, 1845, Messrs. *Hoby*, *Winterbotham*, and *Russell*, as the devisees in trust for sale of a mansion-house and residential property known as the *Mill Hill* estate, and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one *Francis Shaw*, in fee, and *Shaw* thereby, for himself, his heirs, executors, and administrators, covenanted with *Hoby*, *Winterbotham*, and *Russell*, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the *Mill Hill* house and property belonging to the said trustees;" that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling-houses only. The conveyance did not

V.-C. H. 1878 RENALS v. COWLISHAW. Statement.

state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the *Mill Hill* estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the Plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the *Mill Hill* estate, and to secure the continuance of the surrounding neighbourhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the *Mill Hill* estate to *T. P. Bainbrigge* in fee, and, *Bainbrigge* having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the Plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to *Shaw*, but there was in the conveyance to the Plaintiffs a covenant by them with their vendors not to build a public-house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to *Shaw*, or the existence of any restrictive covenant entered into by *Shaw* or by *Gadsby*, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to *Shaw*, for after his death *Mary Shaw*, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to *John Gadsby* in fee, who, in his conveyance, entered into covenants with *Mary Shaw*, her heirs, executors, and administrators, substantially identical *mutatis mutandis* with the restrictive covenants contained in the indenture of the 29th of September, 1845. And subsequently the lands so conveyed to *Gadsby* were sold and conveyed (with certain buildings erected thereon) by *Gadsby*, or persons deriving title through him, to the Defendants as tenants in common in fee.

The Plaintiffs alleged that the Defendants were carrying on

upon their lands and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighbourhood, and had deteriorated the value and amenity of the *Mill Hill* estate. By their action they claimed an injunction to restrain the Defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

Statement.

The principal question argued, and that on which the decision turned, was as to the right of the Plaintiffs to sue upon these covenants.

It appeared that no contract had been entered into or representations made, either upon the occasion of the purchase by *Bainbrigge* from the trustees, or upon the purchase from *Bainbrigge* by the Plaintiffs, that the purchaser should have the benefit of the covenants entered into by *Shaw* with the trustees.

Dickinson, Q.C., and *Renshaw*, for the Plaintiffs:—

Argument.

The Defendants are the assigns of the covenantors, whose rights were restricted by these covenants, and they took with notice of them. The Plaintiffs are the successors in title of the covenantees, and the owners of the residential property, for the protection of which the covenants were entered into. They are accordingly entitled to sue the Defendants on these covenants, and to prevent them from contravening them in the same manner as if the Defendants had themselves been the covenantors, and the Plaintiffs the covenantees: *Richards* v. *Revitt* (1).

[HALL, V.C.:—The question is, whether you are entitled to sue as the assigns of the covenant; you are not under a corresponding covenant with the Defendants, and your covenant with your own vendors comprises only part of the covenant entered into by the Defendants' predecessor in title. Are you entitled to the benefit of *Shaw's* covenants without contract, express or implied, as in

(1) 7 Ch. D. 224.

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the cases of covenants entered into there being a laying out in lots and a general building scheme? I refer to the cases of *Western* v. *Macdermott* (1); *Child* v. *Douglas* (2); *Keates* v. *Lyon* (3).

W. Pearson, Q.C., for the Defendants, referred to *Master* v. *Hansard* (4).]

In *Western* v. *Macdermott* there was, as in this case, a double devolution of title, *i.e.*, both from the covenantor and the covenantee, and the case is in reality an authority in our favour, as is shewn by the report in the Court below (5).

In *Keates* v. *Lyon* the covenant was not with the covenantee "and his assigns," and the case is distinguishable on that ground alone.

[HALL, V.C.:—Lord Justice *Selwyn* there classified the cases, and I collect that his judgment would have been the same had the word "assigns" been added.]

Moreover, there the persons who took the property subject to the covenant, took it without notice of the covenant. And the estate of which we are now the owners is the very same residential property which was retained by the covenantees, and for the protection and benefit of which the restrictive covenants were entered into. They also referred to *Master* v. *Hansard* and *Mann* v. *Stephens* (6).

W. Pearson, Q.C., and *Bury*, for the Defendants, were not called upon.

Judgment.

HALL, V.C.:—

I think this case is governed by *Keates* v. *Lyon*, by *Child* v. *Douglas* (7), as ultimately decided by Vice-Chancellor *Wood* (8), who, after granting an interlocutory injunction in the first instance, refused to grant the Plaintiff an injunction at the hearing, and by the case of *Master* v. *Hansard*.

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee, was certainly not

(1) Law Rep. 2 Ch. 72.
(2) Kay, 560; 5 D. M. & G. 739.
(3) Law Rep. 4. Ch. 218.
(4) 4 Ch. D. 718.
(5) Law Rep. 1 Eq. 499; 35 Beav. 243.
(6) 15 Sim. 377.
(7) Kay, 560; 5 D. M. & G. 739.
(8) 2 Jur. (N.S.) 950.

in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of *Mann* v. *Stephens* (1), *Western* v. *Macdermott* (2), and *Coles* v. *Sims* (3), it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such ~~covenant~~ need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

(1) 15 Sim. 377. (2) Law Rep. 2 Ch. 72.
(3) Kay, 56; 5 D. M. & G. 1.

V.-C. H. 1878 RENALS v. COWLISHAW. Judgment.

The Plaintiffs in this case, in their statement of claim, rest their case upon their being "assigns" of the *Mill Hill* estate, and they say that as the vendors to *Shaw* were the owners of that estate when they sold to *Shaw* a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the *Mill Hill* estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred shew that this is not the law of this Court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the Plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice *Bramwell*, in *Master* v. *Hansard* (1), said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to *Bainbrigge* that there were such restrictive covenants in con-

(1) 4 Ch. D. 724.

V.-C. H. 1878 RENALS v. COWLISHAW. Judgment.

veyances already executed, and expressly or otherwise that *Bainbrigge* was to have the benefit of them, he and the Plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to *Bainbrigge* no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the Plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs.

Solicitors: *Satchell & Chapple*, agents for *J. Gadsby, Derby ; R. Wastell.*

In re HOPKINS' TRUSTS.

V.-C. H. 1878 *May* 3.

Will—Construction—"Issue"—"Children."

A testator by his will gave a fund to trustees "in trust for the lawful issue of *F. H.* surviving him equally to be divided between them if more than one . . . and if but one then for such only child," with a gift over "in default of issue of *F. H.* becoming entitled."

The issue of *F. H.* who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter:—

Held, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter.

Carter v. *Bentall* (1) and *Wyth* v. *Blackman* (2) discussed.

Statement.

PETITION.

John Hopkins, by his will, dated the 6th of March, 1828, bequeathed all his personal estate to trustees on trust for his wife, for life, and directed his trustees, after her death, to stand possessed of a sum of £2000 Consols, part thereof, upon trust to pay the dividends to *Francis Hales* during his life, and after his death to his widow during her life, and after the deaths of both, then to hold the fund upon the trusts following, viz.:—

"In trust for the lawful issue of the said *Francis Hales* surviving him equally to be divided between them if more than one share and share alike, and if but one then for such only child, that is to

(1) 2 Beav. 551. (2) 1 Ves. Sen. 197.

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say, in trust to transfer and pay the share or respective shares of such as shall be twenty-one years of age, or become married, at or before the expiration of twelve calendar months from the decease of the survivor of the said life annuitants, or upon the solemnization of such marriage or marriages, with the dividends thereof. And as to the share or shares of such as shall be under age, in trust to pay such share or shares to the respective parties as they shall respectively attain the age of twenty-one years or be married, and pay and apply the dividends in the meantime unto and for the respective use and benefit of such minors. And in case of the death of any or either of the said parties before his, her, or their attaining the age of twenty-one years or being married, the share or shares of him, her, or them so dying to be payable and paid at the respective periods aforesaid to the survivors or survivor of them. And in default of issue of the said *F. Hales* becoming entitled to the said £2000 £3 per Cent. Consols, it is my will that the same principal sum and the dividends and proceeds thereof shall go to such person or persons and in such manner as my said dear wife *Christian Hopkins* shall by her deed or will direct, appoint, or bequeath the same unto. And in default of such gift, appointment, or bequest by my said wife, the same sum of £2000 £3 per Cent. Consols shall sink into and become part of the residue of my personal estate for the benefit of my residuary legatees after named."

The testator died on the 10th of March, 1828, and his widow died in February, 1835.

Francis Hales died on the 28th of November, 1875, without leaving a widow, and having had three children only, viz., *Catherine,* who married *William Chapman* and died in 1860, leaving six children, all of whom were still alive; *Francis Richard,* who married in 1866, and had issue four children, all born before the death of *Francis Hales* and still alive; and *Elizabeth,* who was still living and a spinster. So that the "issue of *Francis Hales* surviving him" were a son, a daughter, six children of the son, and four children of a deceased daughter; and the question having arisen whether the word "issue" was not by the context of the will restricted to "children," the trustees transferred the sum of £2000 Consols into Court under the *Trustee Relief Act,* and the

son and daughter who survived *Francis Hales* now petitioned that the fund might be transferred to them.

Dickinson, Q.C., and *Stock*, for the Petitioners :—

The word "issue" must be read as meaning children, for the testator, by the use of the word "child," has so explained it. This case is the converse of *Sibley* v. *Perry* (1), where the word "issue" was restricted to "children" by the use of the word "parent." It is in fact not to be distinguished from *Carter* v. *Bentall* (2), where the words were, "and if only one child then to such one child;" for though there is there a gift over in default of "such issue," while here it is in default of "issue . . . becoming entitled" to the fund, in each case the issue must be such as has been previously defined, for in neither case is it a gift over in default of all issue, but of a particular issue.

[HALL, V.C. :—Your argument goes to this, that if there had been no child who survived, the gift would not have taken effect.]

Yes; and other authorities in our favour are: *M'Gregor* v. *M'Gregor* (3); *Ellis* v. *Selby* (4); *Peel* v. *Catlow* (5); *Baker* v. *Bayldon* (6); *In re Merceron's Trusts* (7). The fund is accordingly divisible in moieties between the two Petitioners.

Eddis, Q.C., and *Phear*, for the six children of *Catherine Chapman* :—

The word "issue" must be taken in its wide and general sense unless it is clearly controlled by the context, and the Plaintiffs must shew that it is so controlled. Here the gift to the issue of *Francis Hales* is a gift to take effect after three life interests, and the gift over is not, as in *Carter* v. *Bentall*, in default of "such issue," but generally in default of issue becoming entitled, who to become entitled must survive *Francis Hales*. "Child" is a flexible word and may mean "grandchild," and the expression "only child" occurring once only, and then used to designate a single descendant of *Francis Hales*, is not sufficient to cut down the natural meaning

(1) 7 Ves. 522.
(2) 2 Beav. 551.
(3) 1 D. F. & J. 63.
(4) 7 Sim. 352.
(5) 9 Sim. 372.
(6) 31 Beav. 209.
(7) 4 Ch. D. 182.

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of the recurring word "issue," with which all the other referential expressions are consistent. In *M'Gregor* v. *M'Gregor* (1) the testator himself, by a codicil, interpreted the word "issue" in his will as meaning children; and there was also what amounted to an express interpretation in *Ellis* v. *Selby* (2), *Peel* v. *Catlow* (3), and *Baker* v. *Bayldon* (4); while in *In re Merceron's Trusts* (5) the only question was as to the meaning of the expression "die without issue." On the other hand, the word "children" may be extended to and treated as synonymous with "issue": *Wyth* v. *Blackman* (6); *Dalzell* v. *Welsh* (7). The fund is accordingly divisible in twelfths.

Oswald, for the four children of *Francis Richard Hales*, supported the same contention.

Daw, for the trustees of the will.

Dickinson, in reply.

Judgment.

Hall, V.C.:—

I will, in the first instance, consider the construction of this will without reference to authority. The trust is "for the lawful issue of the said *Francis Hales* surviving him equally to be divided between them, if more than one share and share alike, and if but one then for such only child," and the testator then declares when the shares are to be transferred and paid. Considering that portion of the will according to the plain meaning of the words, and taking into consideration that the word "issue" is one which, though ordinarily used and taken to mean all issue, whether children or more remote descendants, yet may be, and not unfrequently is, used with reference to "children," it appears to me that the testator in creating this trust for issue was creating a trust for children. His words are, "if but one" (*i.e.*, one issue), "then for such only child," that is to say, "an only child is to take under the trust which I have declared in favour of issue, if there be only one child." That being so, it seems to me that the right

(1) 1 D. F. & J. 63.
(2) 7 Sim. 352.
(3) 9 Sim. 372.
(4) 31 Beav. 209.
(5) 4 Ch. D. 182.
(6) 1 Ves. Sen. 197, 200.
(7) 2 Sim. 319, 326.

and correct interpretation of this will is to say that the testator used the word "issue" in the sense of children. In providing for issue he says, "if only one," that is, "if there is only one person to take under the trust for issue, then to such only child," meaning by "one" an only child. I consider that the testator has himself interpreted the word "issue," and explained it to mean children. As regards the subsequent parts of the will, I do not think that there is anything in the observation that he afterwards speaks of the persons to take, not by the description of "issue" or "children," but as "parties," for that is a proper mode of expression in either sense of the word "issue." The ultimate trust is "in default of issue of the said *Francis Hales* becoming entitled." The word "issue" alone is used there, he does not say "such issue;" but the absence of the word "such," when once you have interpreted the word "issue," is immaterial. An interpretation of the preceding trust having been arrived at, the construction of the referential provisions becomes comparatively unimportant. The trust in default of issue, if issue be restricted to children, amounts to a trust in default of children becoming entitled to the fund. No doubt "becoming entitled" includes two things; they must be children who survive their parents, and they must also attain the age of twenty-one years or marry. That is merely another portion of the description or qualification of the persons to take, which does not necessarily enlarge the meaning of the term "issue." Such is the conclusion I arrive at independently of authority.

Then, as to the authorities, the only case which has any direct bearing is that of *Carter* v. *Bentall* (1), which is to my mind not materially distinguishable from the present. It is certainly not so, having regard to the reasoning of the Master of the Rolls in his judgment. Mr. *Eddis* pointed out that in that case there was a reference to the marriage of the testator's daughter, and that there the word "issue," used in reference to her marriage, was rightly held to mean the issue of her marriage. I think that is rather a refinement. It is not referred to by the Master of the Rolls in his judgment, which did not proceed at all upon that, but upon the use which the testator made of the word "child," imme-

(1) 2 Beav. 551.

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diately after the word "issue." The words of the trust there were "and if only one child." Here the word "child" is left out after the word "one." But even if we supply "issue" from the previous word "issue," yet a child is to take; whichever word is supplied, we arrive at the same construction.

With reference to the difference in construction where the word "child" is contained in the trust itself, and where it is merely contained in an explanatory or referential clause, I may refer to the case of *Wyth* v. *Blackman* (1), where Lord *Hardwicke*, in considering the construction of an explanatory clause, said (2), "If it rested on the word 'issue,' there is no doubt . . . . The great objection to this is from *videlicet*, that being an explanatory clause, it restrains issue to children; but that was not the donor's meaning; which was, as is said for the Defendants, principally to explain the shares thereby; although he might mean both." That is to say, he considered that the clause which contained the word "child" was a clause explaining in what shares the property was divisible. That particular clause was considered by Lord *Hardwicke* to be put in to prevent any question about the shares of the different children. In the particular case he thought he found, in other portions of the will, expressions which would assist the interpretation. He certainly did, in arriving at a conclusion, go to a considerable extent upon the probable intention of the testator to include as many as possible. I must, however, decline to speculate as to probable intentions. Observations might be made on both sides. I cannot guess, but must do my best to construe the instrument upon the words themselves, only saying, as regards the general intention, that in any possible view this will contains an unreasonable disposition of the testator's property. Taking, therefore, the words as I find them, the true interpretation is that the word "issue" was used by the testator in the sense of "children." He has, I consider, thus explained himself, and the only persons who can take are the two children of *Francis Hales* who survived him.

I observe that in the case before Lord *Hardwicke* he referred to *Crooke* v. *Brookeing* (3), and observed that, according to the

(1) 1 Ves. Sen. 197. (2) 1 Ves. Sen. 200.

(3) 2 Vern. 106.

authorities, grandchildren and great-grandchildren might come in under the term "children." With regard to that I can only say that such a latitude of construction is not now adopted.

Solicitors: *Hancock, Sharp, & Hales; Rhodes & Son,* agents for *R. Porter, Ipswich; H. C. Soden; Walker, Martineau, & Co.*

SPENCER *v.* CLARKE.

[1877 C. 459.]

Policy of Assurance—Equitable Mortgage—Assignment—Notice—Priority—Constructive Notice—Policies of Assurance Act, 1867 (30 & 31 *Vict. c.* 144).

An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the *Policies of Assurance Act,* 1867.

Accordingly, notice to the *Assurance Company* of such an agreement does not give under that Act any priority over a prior equitable mortgagee who has given no notice but has possession of the policy.

The holder of a policy of assurance on his own life deposited it with *A.* by way of equitable mortgage to secure a loan. *A.* retained the policy, but gave no notice to the company.

B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy-holder upon a deposit of the same policy, and the policy-holder, alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to *B.*, took the loan and signed a memorandum that he had deposited the policy with *B.*, and that he undertook on request to execute to *B.* an effectual mortgage of it.

B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy-holder for the policy, but the policy-holder made various excuses for not handing it over, and died leaving it in the possession of *A.*:—

Held, that the circumstances of the case were such as to put *B.* on inquiry at the time of the loan, and to fix him with constructive notice of *A.*'s security, and that the title of *A.*, as in possession of the policy, must prevail over that of *B.*, although *B.* did and *A.* did not give notice to the company.

Statement.

IN March, 1875, *Thomas Spencer,* since deceased, and the Plaintiff *Evans,* his brother-in-law, both of *Tredegar* in *Wales,* agreed to lend to *T. W. Clarke,* of *Chepstow,* the sum of £1000 in two several sums of £500 each, upon the security of a deposit of two several

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policies of assurance of £500 each upon the life of *Clarke*, one with the *Standard Life Assurance Company* and the other with the *Westminster and General Life Assurance Association*, and of a memorandum of deposit and bond. *Evans* left the completion of the loan to *Spencer*, and on the morning of the 31st of March, 1875, *Spencer* and *Clarke* went to *Spencer's* solicitor at *Tredegar*, and gave instructions for the preparation of the memorandum and bond. *Clarke* handed over to the solicitor an envelope containing the *Standard* policy for £500, a receipt for the last premium upon it, a receipt for the last premium on the *Westminster and General* policy for £500, and a policy for £1000 with the *Railway Passengers Insurance Company;* and when asked for the *Westminster and General* policy, he answered that unfortunately he had put the *Railway* policy into the envelope in mistake for it, but that he had it at home at his house in *Chepstow* (about two hours' journey from *Tredegar*), and that directly he returned he would be sure to send it to *Spencer*. *Spencer* being satisfied with this assurance, the bond and memorandum were prepared, and later in the same day were executed. Upon execution the £1000 was paid to *Clarke*, and the envelope with the *Standard* policy and receipts was delivered to *Spencer*.

The memorandum of deposit was in the following terms:—

"Memorandum that I, *T. W. Clarke*, have this day borrowed and received the sum of £500 from *Thomas Spencer*, and also the like sum of £500 from *John Evans*, and have secured the repayment of the two several sums of £500 and £500, making together the sum of £1000, with interest after the rate of £5 per centum per annum, by my bond under seal bearing even date herewith, and for the better and more effectually securing the same sums with interest as aforesaid, I have deposited with them the said *Thomas Spencer* and *John Evans* all those two policies of assurance for the sum of £500 each effected on my life in the *Standard Life Assurance Company* and the *Westminster and General Life Assurance Association* respectively. And I do hereby for myself, my heirs, executors, and administrators, promise and undertake to make, execute, and deliver unto them the said *Thomas Spencer* and *John Evans*, their heirs, executors, administrators, and assigns, when thereunto requested by him or them so to do, a valid and effectual

mortgage of the said two policies of assurance for the said principal sum and interest, the mortgage to contain such usual powers, covenants, provisions, and declarations as their counsel or solicitor, or their heirs, executors, administrators, or assigns shall advise or require, and to be prepared and perfected at my proper costs and charges, or that of my heirs, executors, or administrators. And I further undertake that if from my refusal or neglect to execute the said mortgage security it shall be requisite to stamp this instrument, that I will pay all attendant and subsequent expenses of stamping the same, and the amount so paid shall be a charge upon the said two policies of assurance."

Notice of the deposit of the policy and of the memorandum of deposit was given on the 10th of May, 1875, to the *Standard Company* and also to the *Westminster and General Association*, and the receipt of the notice was duly acknowledged by both companies in accordance with sect. 6 of the *Policies of Assurance Act*.

Frequent applications were made to *Clarke* by *Spencer* and *Evans* for the *Westminster and General* policy, but *Clarke* made various excuses for not handing it over to them, and never, in fact, did deliver it to them.

Thomas Spencer died in May, 1876, and *Clarke* died in June, 1877.

In August following, the Plaintiffs, *Richard Spencer* (the legal personal representative of *Thomas Spencer*) and *Evans*, for the first time discovered that *Clarke* had in July, 1871, deposited the *Westminster and General* policy with one *W. Tranter* as security for a loan of £100 and interest. *Tranter* had ever since retained the policy in his possession, but he never gave any notice to the Association of his equitable mortgage until after the death of *Clarke*, when he required from them payment of the moneys secured by the policy.

The Plaintiffs then brought this action against *Clarke's* legal personal representative and *Tranter*, for a declaration that they were entitled to the moneys payable under the *Westminster and General* policy in priority to *Tranter*, and for ancillary relief.

Argument.

W. Pearson, Q.C., and *Hemings*, for the Plaintiffs:—

The Plaintiffs are entitled to priority, first, under the *Policies*

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of Assurance Act, 1867, because the deposit of a policy of assurance accompanied by an agreement in writing to execute a legal mortgage on request constitutes an equitable assignment within the meaning of the Act, and under sect. 3 entitles the equitable assignee who gives notice to the office to priority; and *Crossley* v. *City of Glasgow Life Assurance Company* (1) is no authority against this proposition, for there was in that case nothing which amounted to an equitable assignment. Secondly, independently of the statute, because under the general law it is in fact the notice which gives the title in the assignment of a *chose in action*, and here the notice rendered the insurance company trustees for the Plaintiffs. There is, in fact, no competition between an assignee who has and an assignee who has not given notice, unless the former is affected with knowledge of the equities of the latter. In the present case, although the policy was not delivered to the Plaintiffs, sufficient excuses were made to them for the non-delivery; they had not even constructive notice of *Tranter's* mortgage; and while they were diligent in giving notice, *Tranter* was negligent, and, having no better equity than the Plaintiffs, he must suffer for his negligence: *Foster* v. *Blackstone* (2); *Foster* v. *Cockerell* (3); *Meux* v. *Bell* (4); *Fisher* on Mortgages (5).

Dickinson, Q.C., and *Renshaw*, for the Defendant *Tranter*, were not called upon.

Selfe, for the Defendant *Clarke*.

Judgment.

HALL, V.C.:—

I am of opinion that as between the Plaintiffs in this action and the Defendant *Tranter*, the Defendant *Tranter* is entitled to priority as to the policy in the *Westminster and General Life Assurance Association*. That policy was deposited with him by way of equitable security. He is first in point of time, and therefore first as regards his security. The Plaintiffs being second in order of time must be second also in order of priority, unless they got

(1) 4 Ch. D. 421.
(2) 1 My. & K. 297.
(3) 9 Bli. (N.S.) 332.
(4) 1 Hare, 73.
(5) 3rd Ed. ss. 1409, 1410, pp. 870, 871.

priority by the notice which they gave to the insurance office, *Tranter* not having given notice of his security.

It is said that the Plaintiffs are entitled to priority by reason of the provisions of the statute 30 & 31 Vict. c. 144. It appears to me that there is no ground for that contention. In order to bring the case within the statute, there must, according to the plain words of the statute and the explanatory form of assignment given in the schedule, be an assignment, and an agreement to assign upon request is not an assignment. I must now consider the effect of the policy having been actually delivered to *Tranter*. The only excuse which the Plaintiffs put forward for not having obtained possession of the policy is, that they were told a lie by their mortgagor *Clarke*. The security which he was to give was a deposit of the *Westminster* policy as well as the *Standard* policy, and he ought (when he came to receive the money) to have had the *Westminster* policy with him. Instead of that, he produced a paper document which was not the policy in question, but which he seems to have represented he had put into the envelope by mistake. I cannot say that this was sufficient to excuse persons who were advancing money from making further inquiry. They were not justified in relying on such a representation. I am not aware that there is any case precisely in point where the subject of the charge was a policy of assurance, but there is a case which is very analogous to the present, viz., *Maxfield* v. *Burton* (1). In that case there was an equitable mortgage by deposit of the title-deeds of real estate, and there was a subsequent contract signed by the owner of property in contemplation of marriage, by which he agreed to make a settlement. He was asked for the title-deeds, and he told a lie: he said they were with his bankers for safe custody, but that was not true; they were there for the purpose of giving the bankers security. However, the parties were satisfied; the marriage took place on the faith of the representation so made, and an instrument of settlement was executed. Afterwards, when the equitable mortgage was discovered, the parties entitled under the settlement set up the claim that they were innocent purchasers for value of the legal estate without notice. But what did the Master of the Rolls say? (2) "On the question of notice I have no doubt. This is clearly a case of constructive notice. A

(1) Law Rep. 17 Eq. 15. (2) Law Rep. 17 Eq. 18.

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man on his marriage has a freehold estate; he tells the solicitor for the lady with whom he is about to be married, on being asked for his deeds, 'They are deposited with my bankers for safe custody.' The solicitor does nothing more, and it turns out that they are pledged to the bankers. I hold that it was the duty of the solicitor to make further inquiry of the bankers, and to ask for the deeds. If he had done so he would have been told that the representation made to him of their being deposited for safe custody, which of course meant safe custody only, was incorrect, inasmuch as they were deposited by way of mortgage, and upon that mortgage a considerable sum of money was then due. I consider that that was constructive notice, and bound the lady who was about to be married." That appears to me an analogous case to the present. Would a prudent person have taken the risk of the truth of the representation made by the borrower? A prudent person would have told *Clarke* to bring the policy that same night, or would have offered to go or send to *Chepstow* to get it, and would have declined to part with the money until he had received the policy. Vice-Chancellor *Kindersley*, in *Rice* v. *Rice* (1), in commenting upon the case of *Maundrell* v. *Maundrell* (2), says, "We have here, then, ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity." That case shews what importance is attached by the Court to the possession of the deeds. The Vice-Chancellor *Malins*, in the case of *Layard* v. *Maud* (3), says: "I have not a shadow of doubt that where there is merely an equitable mortgage unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or having got, gives up possession of the deeds, he must always be postponed. In this case I must come to the conclusion that there is that degree of negligence in Mr. *Austen* which will postpone his claim as first mortgagee to that of Messrs. *Halford*. I decide this case on the general principle that one equitable mortgagee, without possession of the deeds, must be postponed to another who has that possession." I am not dealing with a case where one of the parties has a legal

(1) 2 Drew. 73, 81. (2) 10 Ves. 271.
(3) Law Rep. 4 Eq. 397, 406.

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title: in such a case there are considerations as to the circumstances under which parties can on equitable grounds be deprived of the benefit of the legal estate. The policy in this case was the really substantial thing. The money having been lent by the Plaintiffs without the policy, and another person having previously got the policy into his possession, no pains were taken by the Plaintiffs to ascertain where the policy was. I consider that the title of the holder of the policy must prevail over the title of the Plaintiffs, although the Plaintiffs gave notice to the insurance office, and he did not.

Solicitors: *Stevens & King*, agents for *C. H. Harris, Tredegar; Waterhouse & Winterbotham*, agents for *Winterbotham, Bell, & Winterbothams, Cheltenham; Jones & Starling*, agents for *Norris & Miles, Tenbury.*

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[1876 S. 6.]

*Investment upon Mortgage of Land—Bequest of Residue of Personalty for Life and in Remainder—Mortgage of Reversionary Interest—*3 & 4 *Will.* 4, *c.* 27, *s.* 42—*Interest.*

A. was legatee in reversion after certain life-interests of a testatrix's residuary personal estate. The estate consisted wholly or chiefly of a sum of £3000 invested on mortgage of real estate by the testatrix and continued on such investment by her trustees. *A.* mortgaged his interest in the £3000, and after sixteen years (during which *A.* paid no interest on his mortgage) *A.*'s reversion fell into possession:—

Held, that *A.*'s mortgagee was entitled as against the residuary estate to recover the whole arrears of interest, the mortgage by *A.* not being a charge on real estate within the meaning of sect. 42 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).

Semble, however, that if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of sect. 42 in barring arrears of interest beyond six years.

Vincent v. *Going* (1), *Sinclair* v. *Jackson* (2), and *Wheeler* v. *Howell* (3), discussed.

Statement.

ALICE WARD, who died in 1826, by her will, made in April, 1824, bequeathed her residuary personal estate to her executors

(1) 1 J. & Lat. 697, 701. (2) 17 Beav. 405, 410.
(3) 3 K. & J. 198, 201.

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upon trusts for investment, and for the benefit of *Elizabeth Catherine Hill* the elder for life, and after her death for *Elizabeth Catherine Hill* the younger, *Caroline Hill* and the Defendant *Harriet Hill* for their lives, and after their deaths for their children, and if they should die without having children, upon trust for *William Wilkes Hill.*

Alice Ward at her death was possessed of a sum of £3000, which was secured by a mortgage, executed in 1824, of undivided shares in a manor and hereditaments at *Beeston.* This sum formed the main part of her residuary estate, and was allowed to remain outstanding.

W. W. Hill, by an indenture dated the 27th of September, 1861, assigned to the Plaintiff, *Ambrose Smith,* his reversionary interest in the £3000 by way of mortgage to secure the repayment of £1741 7*s.* 4*d.* and interest. *W. W. Hill* died intestate on the 20th day of June, 1871, indebted to various judgment, specialty, and other creditors, as well as to the Plaintiff, and was possessed of no property except his reversionary interest in the £3000.

No interest had been paid by him on the sum of £1741 7*s.* 4*d.* *E. C. Hill* the elder died many years ago, and *E. C. Hill* the younger and *Caroline Hill,* who were living at the date of the mortgage in 1861, had died spinsters.

The Plaintiff, *Ambrose Smith,* brought this action for the administration of the testatrix's estate, in order that he might obtain payment of the money due to him upon the mortgage security. After the commencement of the action *Harriet Hill* died without having had any issue, and the manor and hereditaments situate at *Beeston* were sold in 1877, and the mortgage money of £3000 was paid to the trustees in whom it had become vested.

The Plaintiff now applied by summons, adjourned into Court, for payment of the entire fund in part discharge of his mortgage debt of £1741 7*s.* 4*d.*, and the interest which had accrued due thereon between the years 1861 and 1878, the whole amounting to the sum of £3171 3*s.* 9*d.* The question was whether, as between the Plaintiff and the legal personal representative of the mortgagor, the Plaintiff was entitled to interest for the whole period, or for not more than six years prior to the date of the action.

Hastings, Q.C., and *Bunting*, for the Plaintiff:—

The statute 3 & 4 Will. 4, c. 27, s. 42, does not apply to a reversionary interest of this kind: *Wheeler* v. *Howell* (1). If the statute does apply, this is not a proceeding to recover interest under the provisions of the 42nd section. *Edmunds* v. *Waugh* (2), and the decisions in *In re Haselfoot's Estate* (3) and in *In re General Provident Assurance Company* (4), are authorities which apply to this case. The statute does not apply to a reversionary interest. The 42nd section enacts that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by any action, but within six years next after the same shall have become due, "Provided nevertheless that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid." The intention was to shew the principle upon which the section was founded. If a person should be in a position to take the fruit of property, his own neglect in not enforcing his claim for the period of six years would be a bar to his right, but the enactment was not to apply where it was impossible for such person to be put in possession of the property. That is a reasonable construction of the enactment, and where there is a prior mortgage, and the second mortgagee could not get into possession, was a good illustration, and the principle applies more strongly to a reversionary interest: *Wheeler* v. *Howell* (5). In *Bowyer* v. *Woodman* (6), where there was a mortgage by husband and wife of her reversionary interest in money payable out of land, the same learned Vice-Chancellor held that no more than six years' interest could be recovered. No doubt the decision in that case was in conflict with that in

(1) 3 K. & J. 198.
(2) Law Rep. 1 Eq. 418.
(3) Ibid. 13 Eq. 327.
(4) Law Rep. 14 Eq. 507.
(5) 3 K. & J. 198, 201. Law Rep. 3 Eq. 313.

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the case of *Wheeler* v. *Howell* (1), which was not cited. It does not seem to have occurred there to anybody that the mortgage was of a reversionary interest. [They also referred to *Sinclair* v. *Jackson* (2).] The statute was not intended to apply to a case of this kind at all, because this was a mortgage of residue, and it was a mere accident upon what security it happened for the time being to be invested.

W. Pearson, Q.C., for the trustees:—

The question which has arisen comes under the 40th section, it being a legacy, if it does not under the 42nd. This sum, however, of £3000 was a charge upon land, and the assignment by the mortgagor (*Hill*) was not of the £3000 as part of the residuary estate of *Alice Ward*, but of the £3000 secured by the indenture of mortgage of April, 1824, of certain real estate. The words of the 42nd section are, "no arrears of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by action but within six years;" and this was money charged upon or payable out of land. It was assigned as a charge upon land, and it remained so until May, 1877. It was long after this administration action was commenced that the property and mortgage was sold by the mortgagor and the £3000 paid off. It was upon the very terms of the indenture money charged upon that property, and therefore within the 42nd section, and interest for six years only could be recovered. The only thing contemplated by the proviso was where an estate was mortgaged first to *A.* and then to *B.*, and *A.* was in the actual possession, the statute should not run as against *B.* so long as *A.* was in possession. *B.'s* right to recover possession was to commence to run when the prior incumbrance went out of it, but the proviso did not interfere with the prior enactment, which was sweeping in its terms that no more than six years' interest should be recovered. *Wheeler* v. *Howell* was the case of an annuity, and has no application to a mortgage at all. The 42nd section does not apply to an annuity in the least. *Bowyer* v. *Woodman* (3), decided by the same learned Judge, is really the case which governs this one. That was the mortgage of

(1) 3 K. & J. 198. (2) 17 Beav. 405, 410.
(3) Law Rep. 3 Eq. 313.

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a legacy which was charged upon land. It was a distinct case of land mortgaged as here, but only six years' interest was allowed. The decision in *Sinclair* v. *Jackson* (1) may also be relied upon by the trustees. The mortgagee (Plaintiff) might have exercised his power of sale, got in his money, and paid off the arrears of interest. The only thing which *Wheeler* v. *Howell* (2) decided was that the capital of a legacy might be recovered after twenty years. The Plaintiff is entitled to only six years' interest.

Hastings, in reply:—

Even in the absence of authority, the principle of the statute is that the 42nd section does not apply to a case of this kind. That principle is that if a person cannot obtain possession of the rents and profits he shall be protected. That is a fair construction of the section, and the decision in *Wheeler* v. *Howell* was based upon it.

Judgment.

HALL, V.C.:—

The question which has been argued as to the application of the statute 3 & 4 Will. 4, c. 27, to this case, the property mortgaged being a reversionary interest, is not, upon the authorities, in a satisfactory state.

I find, though counsel have not referred to the case, that the point was considered by Lord *St. Leonards*, in 1844, in *Vincent* v. *Going* (3). In that case a judgment was recovered, and the property which it was desired to make available to satisfy it was a reversionary one, but there had been a tenancy for life during a considerable time, which continued while the judgment was a charge upon the property, and it was contended that the interest could be claimed by reason of the existence of the prior life estate. The Lord Chancellor, observing upon the case, said: "It is clear that it is not within the exception of the Act. The exception is where a man has an estate and there are several incumbrancers on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession if he come for relief within a year after the prior creditor has been removed from

(1) 17 Beav. 405, 410. (2) 3 K. & J. 198.
(3) 1 J. & Lat. 697, 701.

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the possession. That is a fair and just provision. But this is a case of a wholly different nature, for here there was an estate for life not bound by the judgment, and a remainder (which I may consider as a remainder in fee) which was bound by the judgment; and the receiver appointed in 1839 was a receiver over the life estate in respect of a charge affecting it. The case, therefore, is not within the exception, for the judgment creditor of the remainderman had no right to enter into possession of the estate during the life of the tenant for life, even supposing the possession had been vacant. The simple question is whether or not a judgment creditor of a remainderman in fee is entitled to recover out of the lands the arrears of interest which accrued due for any period, however long, during the existence of the tenancy for life. The Act of Parliament is very express that he shall not be entitled to recover interest upon his judgment but within six years after it becomes due or an acknowledgment has been given. The Act does not say that if he could have had a remedy against the lands and neglected to avail himself of it, he shall only recover six years' interest thereout; but it is absolute and positive that no arrears of interest shall be recovered but within the time specified, and then the exception states the only case in which the Legislature intended to relieve the creditor from the effect of the previous enactment. I am therefore inclined to think that the report is right. I will, however, consider the matter before I pronounce my decision." Then on a subsequent day he said, after referring again to the statute, that the creditor gets all that he is entitled to. "The exception in the statute is merely that while a prior incumbrancer is in possession his possession shall not prejudice a subsequent incumbrancer who is waiting, and who comes in in reasonable time to make the fund available for the payment of his demand. I am not embarrassed by the provisions of the 3rd section of the 3 & 4 Will. 4, c. 42, for this is a proceeding upon a judgment, not upon a bond or covenant. I must say that it is most desirable that the Legislature should clear up the difficulties which they have themselves created, for it seems difficult to reconcile the two statutes."

It seems, therefore, to me that that is a direct decision by Lord *St. Leonards* on the point, and in the year 1844. That case is not, I think, referred to in any of the subsequent cases, and that is

rather remarkable. The next case, *Sinclair* v. *Jackson* (1), was decided in 1853, and it is a direct authority upon the point to the same effect. The reason given in that case in reference to foreclosure I agree with. It does not seem to shew that the right of foreclosure ought to affect the question of whether more or less arrears of interest should be recoverable. If the mortgagee forecloses there is no doubt he could then sell, if he thought fit, the property as his own, and seek to get whatever the reversion would produce. However, there is the authority of *Sinclair* v. *Jackson*. The other two authorities are *Wheeler* v. *Howell* (2) and *Bowyer* v. *Woodman* (3). I consider that the judgment of the Vice-Chancellor in *Wheeler* v. *Howell* is a decision the other way upon the point. It is very shortly put, as it merely shews that the statute does not apply to arrears of an annuity charged upon a reversionary interest on land, so long as the interest continues to be reversionary. That is all the judgment upon the question. It was said in reference to that case that it does not apply at all, as it may have been decided upon the 40th section and not upon the 42nd, but I do not agree with that observation. I think the case was decided upon the 42nd section. It may be that it was not within that part of the 42nd which deals with arrears of interest in respect of any legacy, but it is within that part of the section which says no arrears of rent shall be recoverable "for rent" which by the interpretation clause is considered to mean annuity; therefore it is clearly within that, and the argument proceeded upon it. That case, therefore, is an authority upon the point.

With regard to the other case of *Bowyer* v. *Woodman*, which was a decision of Vice-Chancellor *Wood* the other way—I do not think I can put it in competition with his previous judgment, as I do not think the point there was really very much before the Court—the question considered and decided being simply whether, having regard to the interest being that of a married woman, it was, under the circumstances, an interest in land which could be dealt with under the statute, and it being held that it was an interest in land which could be dealt with under the statute, it was next said that no more than six years' interest could be claimed. That case was

(1) 17 Beav. 405. (2) 3 K. & J. 198.
(3) Law Rep. 3 Eq. 313.

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not like the one now before the Court, as it was the case of a reversion in lands devised to trustees upon trust to sell, and that was unquestionably an interest in land. And it had been held before that such an interest might be dealt with by a married woman by levying a fine. In this state of the authorities on that part of the case, I should consider myself, having regard to the express decision of Lord *St. Leonards* after the question was fully argued and considered; to the case before Vice-Chancellor *Wood*, where the question was not so fully considered; and to the case before the late Master of the Rolls, bound to hold that the arrears would not be recoverable while this property was reversionary. Though that is, as I consider, the state of the law upon this question, I must at the same time express my regret that it is so, because the reason and purpose of the exception and proviso in the 42nd section are a reason and purpose which apply in fact to such a case as that of a charge upon a reversion where there is a preceding life interest. It is only that the statute has not carried that out. It has only provided for one case, and not for the other cases which are equally within the principle of the proviso.

Upon the other point, however, I think that this is not an interest in land within the meaning of the 42nd section. The property mortgaged was the reversionary interest of the mortgagor, derived under a trust for him of the residuary personal estate of the testatrix. Her residuary personal estate happened to consist partly or wholly, it is quite immaterial which for this purpose, of the sum of £3000, invested upon mortgage. The trusts of her will were such as did not necessarily keep the £3000 as a separate part of her residuary estate. Under those trusts the investments might have been varied, and independently of the trusts the position of the fund might have been altered by reason of the mortgagor paying off the mortgage; so that it was a fluctuating, or a possibly fluctuating, investment, as it might have been varied from time to time. The mortgagor mortgaged his interest in that sum, that is to say, the fund itself in its then state of investment. That mortgage would have been perfectly effectual against any security whatever on which the estate might happen to be invested at the time that it became available, and it appears to me that it is not a fair construction of the 42nd section of the statute to treat that

as a mortgage of an interest in land so as to fall within the section, it being clear that mortgages or securities upon general personal estate, or upon other than that which is properly within the terms of the section, are not within the scope of that provision. Therefore I hold upon that ground that the mortgagee is entitled to be paid in full all the arrears of interest.

The trustees must be paid their costs out of the fund, and the residue must be paid to the Plaintiff in accordance with the summons.

Solicitors: *Learoyd, Learoyd, & Peace; Pitman & Lane,* agents for *Markland & Davy, Leeds.*

GEE *v.* MAHOOD.

[1871 G. 104.]

Annuity—Corpus or Income—Direction to set apart Investments to produce Annuity — Bequest of Residue — Deficiency of Income — Annuitant not entitled to Corpus.

Testator empowered his trustees to make demises of his estate or part of it for building purposes, and also to sell all his residuary real and personal estate and to invest the proceeds, and directed them to set apart a sufficient portion of such investments to produce an annuity of £1200, which he bequeathed to his wife for her life, payable quarterly, and he gave the entire residue of his estate after his wife's death for the benefit of his children. The income of the property was not sufficient to provide for the widow's annuity:—

Held, that the widow was not entitled to have the deficiency raised out of the corpus of the trust estate.

FURTHER CONSIDERATION AND PETITION.

Robert Gee, who died in July, 1869, by his will made in September, 1868, after appointing his wife and two other persons trustees, and giving his household effects and other things, and a sum of £1200 Consols to his wife, an annuity of £20 to *Mary T. Drabble*, and all his estate situate at *Norwood* to his wife, gave all other his real estate, and the residue of his personal estate, to the trustees upon trust to receive the income. The testator then empowered the trustees to make demises of his estate, or part thereof, for terms of years for building purposes, and also at such

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times as they thought proper, during the widow's life, to sell and dispose of his real and personal estate, and directed them to invest the proceeds, as in the will mentioned, upon further trust "to set apart a sufficient portion of such investments as will produce the annuity of £1200, which I bequeath to my wife for her life, payable quarterly." The testator directed such annuity, in case of his wife's second marriage, to be reduced to the annual sum of £150 instead of the sum of £1200, and the investment so set apart to be reduced accordingly. And subject to such investment in favour of his wife, in trust to set apart £5000 other part thereof for his daughter, the Plaintiff, *Zara Gee*, on her attainment to the age of twenty-one years or marriage, which should first happen, to be settled upon her, and in case of her marriage, upon her and her children, as the trustees for the time being should by deed declare. "And as to the entire residue of my said trust estate, and also as to that part thereof set apart in favour of my said wife, after her death, and as to such part thereof as should be no longer required to be set apart in consequence of her second marriage," in trust as to one moiety thereof for the three children of his daughter *Jane T. Carmichael*, equally, with other trusts in case of their dying under the age of twenty-one years and without having been married, and as to the other moiety for the benefit of his daughter *Zara Gee* and her children. The bill was filed in June, 1871, by the daughter *Zara Gee*, who was at that time in her twenty-first year, for the administration of the trusts of the will.

The widow had not married again.

The yearly income of the trust estate did not amount to £1200, and the principal question now was whether the widow was entitled to have the deficiency raised out of the corpus of the trust estate.

Argument.

Dickinson, Q.C., and *W. W. Cooper*, for the Plaintiff, after stating that there were two questions for consideration—First, whether the gift of £5000 to the daughter *Zara* was absolute upon her attaining the age of twenty-one years, or when she married: *In re Dowling's Trusts* (1); and, secondly, whether the

(1) Law Rep. 14 Eq. 463.

widow was entitled to have the deficiency in the income raised to £1200 a year out of the corpus—referred to the cases of *Bright* v. *Larcher* (1), *In re Tootal's Estate* (2), *In re Mason* (3), *May* v. *Bennett* (4), *Mills* v. *Drewitt* (5), *Birch* v. *Sherratt* (6), *Wright* v. *Callender* (7), and *Michell* v. *Wilton* (8); and submitted that upon these authorities the distinction which had been taken was now well and clearly established, and it was,—that if the annuitant was really a legatee of the annuity, then that legacy must be paid in full out of the fund which was a means to an end, *i.e.*, out of the general residue of the testator's estate; but if a fund was created, not for the purpose of paying an annuity, but for the purpose of giving to *A.* a life interest in the fund, with remainder to *B.*, then all that *A.* could get was a life interest, although the testator might have pointed out how the fund should be invested, for the purpose of producing a certain amount of income. In this case there was, not only upon the true construction of the will, but by the express words of it, not merely a trust to hold the investments for the widow for life and for others after her death, but the testator bequeathed the annuity for her use, and made provision for the payment of it as a legacy; therefore, notwithstanding the case of *Baker* v. *Baker* (9), which might be quoted against her, the widow was entitled to have her annuity of £1200 made up out of the corpus.

Farwell, for an incumbrancer, referred to the case of *Bell* v. *Bell* (10).

Maidlow, for the Defendant *Mahood*.

W. Pearson, Q.C., and *V. Hawkins*, for the *Carmichael* family:—

There was not an absolute and imperative trust to convert, but the trustees were to sell at such times as they thought proper during the widow's life, and invest the proceeds upon the trusts,

(1) 3 De G. & J. 148.
(2) 2 Ch. D. 628, 633.
(3) 8 Ch. D. 411.
(4) 1 Russ. 370.
(5) 20 Beav. 632.
(6) Law Rep. 2 Ch. 644.
(7) 2 D. M. & G. 652.
(8) Law Rep. 20 Eq. 269.
(9) 6 H. L. C. 616.
(10) 6 Ir. Rep. Eq. 239.

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and then to set apart a sufficient portion of the investments. There was a clear and distinct gift of the residue: *Baker* v. *Baker* (1) and *Tarbottom* v. *Earle* (2) governed this case, and *Michell* v. *Wilton* (3) and *In re Tootal's Estate* (4) had no application to it. The only question was, under which class of cases did the present fall? The application of the income of the unconverted estate was the primary fund, and the trustees could not, until they in their discretion had converted, make the investments and set apart anything to provide for the widow. The investments were specifically given over, and the widow ought not to be allowed to take anything more than the income of the investments and property. The widow was to be permitted to enjoy the investments during her life, and upon her death they were to be divided in a particular manner, and the Court ought not to destroy that property of which the widow was to have the income only, and which the testator had given to others.

Dickinson, in reply.

Judgment.

HALL, V.C.:—

In my opinion the widow is not entitled to have the deficiency of income to pay her £1200 a year raised out of the corpus. The testator directed the proceeds of conversion and collection of all his real estate and residuary personalty to be invested in certain specified investments, and then declared that the trustees should set apart a sufficient portion of such investments as would produce the annuity of £1200, which he bequeathed to his wife for her life, payable quarterly; and, subject to such investments, to set apart £5000, other part thereof, for his daughter; and as to the entire residue of his trust estate, and also as to that part thereof set apart in favour of his wife after her death, certain trusts were declared. It appears to me that the will in this case is substantially undistinguishable from the will of the testator in the case of *Tarbottom* v. *Earle*, in which Vice-Chancellor *Stuart* held that the corpus could not be resorted to. The case of *Baker* v.

(1) 6 H. L. C. 616.
(2) 11 W. R. 680.
(3) Law Rep. 20 Eq. 269.
(4) 2 Ch. D. 628, 633.

Baker (1) seems to be also a case which requires me to hold that the widow is not entitled to resort to the corpus. In that case the annual sum was in the residuary gift mentioned as an annuity, but Sir *George Turner*, when the case was before the Lords Justices (2), did not consider that sufficient to give to the person entitled to the annual sum all the rights of an ordinary annuitant, and I do not think that in the present case the particular words, "annuity of £1200 which I bequeath to my said wife," are sufficient for that purpose. They appear to me to be only language employed to create one of several trusts declared of the proceeds of conversion and collection of the realty and residuary personalty. In *Baker* v. *Baker* the direction to pay was to pay the dividends, interest, or annual income. Here the trust is to pay the annuity of £1200, but such payment is to be by means of there being set apart a sufficient portion of the investments to produce the annuity of £1200 a year, which, fairly interpreted, is a direction to pay with or out of the income which the appropriated investments may produce. The words, construed according to their fair and ordinary interpretation, do not mean to pay out of capital and income, or out of income and if and so far as necessary out of capital. The trust of the "entire residue . . . . and also as to that part thereof set apart in favour of my said wife after her death," is a trust in which the investments to produce the annuity are given over in their integrity "after the wife's death," not "after the satisfaction of the annuity," a distinction stated and recognised by Lord Justice *Rolt* in *Birch* v. *Sherratt* (3). It is to be observed in the present case that the fund set apart after the death of the wife, although given over along with the residue, is specified and described independently of it, the case being in that respect similar to that of *Tarbottom* v. *Earle* (4). In that case the separate fund and the residue were given in two distinct sentences following each other. Here the residue and the fund are given in the same trust. This difference is, I consider, one of form only. In *Wright* v. *Callender* (5) the annuity fund was directed, after the decease of the annuitant, to fall into residue,

(1) 6 H. L. C. 616.
(2) 7 D. M. & G. 6[illegible].
(3) Law Rep. 2 Ch. 649.
(4) 11 W. R. 680.
(5) 2 D. M. & G. 652.

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and was subsequently given by reference to the disposition of the residue, the residue being given to certain persons named, and the annuity fund to those of them living when the fund fell in, or the issue of those deceased. As to that case, Sir *George Turner*, in *Baker* v. *Baker* (1), considered that Lord *Cranworth's* decision in *Wright* v. *Callender* (2) depended upon the direction to fall into residue. He says of that case, "From this disposition," *i.e.*, the direction to fall into residue, "Lord *Cranworth*, as I understand his judgment, drew the same conclusion as had been drawn in *May* v. *Bennett* (3), that the first gift was intended to be an annuity, and then he considered that the subsequent disposition of the capital fund evinced no intention to alter the character of the first gift." Lord *Cranworth*, in his judgment in *Baker* v. *Baker* (4), states what was the ground of the decision in *Wright* v. *Callender*, from which it would seem that the decision turned upon a particular intent to be collected from the will. Independently of the appropriated fund in the present case not being directed to fall into residue, or given by reference to a disposition of residue, it may be observed that in *Wright* v. *Callender* there was a separate trust for investment of an annuity fund, whilst in the present case all the proceeds of realty and residuary personalty are to be invested, and then an appropriation is to take place; and Lord *Cranworth* admitted, in *Wright* v. *Callender*, that if there had been anything shewing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the corpus could not have been resorted to; and I would refer to the observations of Lord *Chelmsford* in the same case. *May* v. *Bennett* was cited on behalf of the widow. Of that case Lord *Brougham* disapproved in *Baker* v. *Baker*. In *May* v. *Bennett* the fund was to fall into residue, and Sir *George Turner*, in *Baker* v. *Baker* (5), treats the case as depending upon that, and he treats *Mills* v. *Drewitt* (6), which in this case was also relied upon for the widow, as decided entirely on the authority of *Wright* v. *Callender*. But this is clearly a mistake. As to *Mills* v. *Drewitt*, it must be observed that it was decided before *Baker*

(1) 7 D. M. & G. 687.
(2) 2 D. M. & G. 652.
(3) 1 Russ. 370.
(4) 6 H. L. C. 629.
(5) 7 D. M. & G. 686.
(6) 20 Beav. 632.

v. *Baker* (1). In *Birch* v. *Sherratt* (2), relied upon for the widow, there was not a separate fund provided; and as to *Bright* v. *Larcher* (3), also relied upon for the widow, the fund to be set apart was after the death of the annuitant to be applied in the same manner as the testator had directed the residue of his personal estate to be applied, upon which the decision was rested. In the case of *In re Tootal's Estate* (4), also relied on for the widow, the testator, by separate introductory clauses, gave annuities, and then directed a fund to be set apart to answer the annuities, and then gave his residuary estate, including the fund set apart to answer the annuities. That case differs from the present, first, because there were separate independent gifts of the annuities, and, secondly, because the fund set apart was treated and dealt with as residue; "including" expressing that that fund was given as being comprised in the residue. It does not appear to me that the £5000 being given "subject to such investment in favour of my said wife" is in favour of the wife's claim. On the contrary, "subject to such investment" would seem to limit the wife to the investment. The words "subject to the payment of the annuity" might have a different operation. In *Birch* v. *Sherratt* Lord Justice *Rolt* said (5): "If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact from and after the annuitant's death to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but 'from and after satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate, or of the trust fund. This view of the principle of construction appears to me not to be inconsistent with any one of the cases which have been cited." I have not mentioned the provisions of the will reducing the wife's annuity on marriage. I have considered them, but they do not appear to me to vary the conclusion I have come to. As to the words "subject to," Mr. *Farwell* referred

(1) 6 H. L. C. 616.
(2) Law Rep. 2 Ch. 644.
(3) 3 De G. & J. 148.
(4) 2 Ch. D. 628.
(5) Law Rep. 2 Ch. 649.

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me to *Bell* v. *Bell* (1). The words "subject thereto" were in that case construed subject to the testator's widow receiving payment of an annuity in full, but that was because, according to the correct construction of the preceding part of the will, she was entitled to such payment. Here the words are not "subject thereto," but "subject to such investment in favour of my said wife." Those parts of the will which mention and make provision as to the rents and income until conversion do not seem to me to be important. I think that the widow must take whatever the income may be until conversion, and the income of the realized property for the time being up to £1200 a year, from that source, *i.e.*, she will not be entitled to arrears of that annual sum, but will take £1200 a year if and when the annual income of the property, whether invested or not, will suffice to pay her that sum. In reference to the annuity fund being given over in its integrity, Lord *Cottenham's* observations in *Foster* v. *Smith* (2) may also be referred to. There will be one order on the petition and further consideration, the costs of the petition being costs in the action.

As to the question whether the Plaintiff is, having attained twenty-one without having married, absolutely entitled to the £5000, or whatever, under the gift of that sum, she may hereafter be declared to be entitled to, I think it better not now to decide that question. Her rights under that disposition in other respects remain for future determination; and as she may marry and have a child, in which case such child will be heard as to whether there should be a settlement or not, I consider it more proper not to deal at present with that question.

Solicitors: *Stokes, Saunders, & Stokes; Hicks & Son; Billinghurst & Wood.*

(1) 6 Ir. Rep. Eq. 239. (2) 1 Ph. 629.

In re COX'S TRUSTS.

V.-C. H.
1878
June 28.

Will—Bequest of Share of Profits of Business—Ascertainment of Profits—Legatee of Life Interest—Apportionment Act, 1870—"*Dividends or other Periodical Payments.*"

A testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the net profits to *J. C.* during his life, and after his death to his widow during her life; and the testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but the same should be wholly in the discretion of the trustees, except that they should every January draw up a balance-sheet shewing the net profits during the year ending on the then preceding 31st of December.

The trustees carried on the paper, gave notice to *J. C.* and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to the 30th of June and the 31st of December in each year, and they did so divide the same up to the 30th of June, 1877.

On the 23rd of December, 1877, *J. C.* died, and his widow claimed the one-fourth share of the net profits of the half-year ending on the 31st of December, 1877:—

Held, first, that upon the terms of the will the person to take a share of the profits must be living at the time when it was ascertained that there were profits to be divided; secondly, that the profits in question were neither "rents, annuities, dividends, or other periodical payments," within the meaning of the *Apportionment Act*, 1870; and, consequently, that that Act did not apply, and the widow was entitled to the whole profits of the half-year in question.

PETITION.

Statement.

Mrs. *J. C. Cox*, the proprietor of *The Builder* newspaper, by her will dated in August, 1858, bequeathed the newspaper and all that appertained to it to trustees upon trust during so long as they thought fit to carry on and continue the publication of it, and after payment of all outgoings to apply the net profits in manner therein mentioned, being, as to one-fourth part thereof, upon trust to pay one-fourth share of such net profits to *J. A. D. Cox* during his life, and after his death to his widow, and after the death of the survivor then over; and the testatrix declared that no person entitled to participate in the profits, nor any other person except the trustees, should have any right of control or

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interference in relation to the management or carrying on of the publication, or the mode or time of ascertaining and dividing the profits thereof; but the same should be wholly in the discretion of the trustees, nor should any such person have any right of investigating the accounts of the publication, or any right to require information as to the affairs thereof, except that the trustees should in the course of every January draw up a concise statement or balance-sheet shewing the net profits accrued during the year ending on the then preceding 31st of December; and every person interested in such profits should be entitled to inspect, and at his own expense to have a copy of, such statement or balance-sheet, and might, if dissatisfied therewith, require the account to which the same should relate to be investigated at his own expense by a professional accountant.

The testatrix died on the 14th of August, 1858. The trustees carried on the paper, and ascertained and divided the profits yearly, up to the 2nd of August, 1870, when they gave notice to Mr. *J. A. D. Cox* and the other beneficiaries under the will, that they intended until further notice to make from time to time a half-yearly division of the net accrued profits up to the 30th o June and the 31st of December in each year.

This half-yearly division was accordingly made up to the 30th of June, 1877. On the 23rd of December, 1877, Mr. *J. A. D. Cox* died, and the question having arisen whether, under the *Apportionment Act*, 1870, or otherwise, an apportioned part of the one-fourth share of the net profits for the half-year ending on the 31st of that month belonged to his estate, or whether the same share was payable to his widow as the person entitled to the next life interest, the trustees paid the amount representing that share into Court under the Trustee Relief Acts, and the widow now petitioned that it might be paid out to her.

Argument.

Dickinson, Q.C., and *W. W. Karslake*, for the Petitioner:—

There is nothing in the terms of the gift to make this share of profits apportionable between the successive tenants for life; and profits of a partnership business to be ascertained and paid by persons having such large discretionary powers are not "dividends or periodical payments" within the meaning of the *Apportionment*

Act, 1870: *Jones* v. *Ogle* (1). If not, there are no other words in the Act which are applicable, and the Petitioner is entitled to the whole amount paid in.

Argument.

W. Pearson, Q.C., and *Hemings*, for the legal personal representative of *J. A. D. Cox*:—

The estate of *J. A. D. Cox* is entitled to an apportioned part of the sum paid in. In *Jones* v. *Ogle* the question was not between successive tenants for life, but between the estate of the testator and a person to whom he had given a life interest; and the testator was a partner in a private trading partnership in which the profits were not ascertained and divided at fixed periods, but depended upon the state of the business and the discretion of the managing partner. Here the will defines the rights of the parties. It is not a case of partnership. The profits must be divided, and must be ascertained at fixed periods, the trustees having only a discretion as to the mode or time of ascertainment and division, which discretion they have exercised by fixing half-yearly periods and dividing accordingly. These, therefore, were "periodical payments" within the meaning of the Act. Moreover, they would be included in the word "dividends," and the will is within the operation of the *Apportionment Act*, although the testatrix died before the passing of that Act.

[They cited *Capron* v. *Capron* (2); *Hasluck* v. *Pedley* (3); *Pollock* v. *Pollock* (4); *Lindley* on Partnership (5).]

Wolstenholme, for the trustees.

Judgment.

HALL, V.C.:—

It appears to me that this case is not within the *Apportionment Act*, 1870. The case may be considered with reference to the *Apportionment Act*, and also upon the construction of this particular will independently of the Act.

I will proceed to consider it in the first instance independently of the Act. The testatrix directed the carrying on of her business,

(1) Law Rep. 14 Eq. 419; Ibid. 8 Ch. 192.
(2) Law Rep. 17 Eq. 288.
(3) Law Rep. 19 Eq. 271.
(4) Ibid. 18 Eq. 329.
(5) 4th Ed. p. 1081.

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and gave the particular share with which we are dealing, viz., one-fourth of the net profits, to her trustees upon trust to pay the same to *J. A. D. Cox* during his life, and after his decease to his widow, the Petitioner, *Mary Cox*, during her life, with a gift over. The gift, then, is a gift of profits. Now, in ascertaining the profits of a business, the usual course is to take a particular period of time between the day up to which the profits are to be brought into account and the last preceding day when a similar account was rendered.

In this case the testatrix left it entirely to the discretion of her trustees to fix the mode and time of ascertaining and dividing the profits; and that mode and time might apparently be changed from time to time. It is true that in the particular notice which the trustees gave they stated that they meant to divide the profits half yearly instead of yearly, and that course they continued. But it does not appear to me that the course so adopted can be taken as giving any title, in respect of that which was to be done at the end of the year, to a person who died before that time arrived. What was given to such person was merely given in the shape of a trust of profits, and such profits were to be ascertained at the end of the year.

Under the trusts, then, and independently of the Act, I take it that, in order to be entitled to the benefit of the trust, the person to take must be living at the time when it was ascertained that there had been some profits in the preceding year. It may well be that in any given case the whole profits of a business have been made in one week, or even in one day. There is nothing which can enable me to say that the profits are to be spread over the whole year and divided between the beneficiaries according to the time during which each of them has lived. There is nothing in the circumstance that the gift is one of profits which can of itself create such a division. You must find something in the instrument itself. I am now speaking of the instrument independently of the Act of Parliament. In all these cases it is to be observed that the first *cestui que trust* (where the *Apportionment Act* is not applied) comes in immediately for the whole benefit of the first division subsequent to the death of the testator. This testatrix died in the month of August, therefore the first tenant for life

apparently came in for the whole profits of the then current year, that is, he not only got the profits of five months, from August to December, but the profits for the whole twelve months up to December, that is to say, seven months in addition. That being so, it appears to me that upon this will there is nothing entitling Mr. *J. A. D. Cox* to anything except what was ascertained and determined to be profits accruing during his life. I cannot divide it or apportion it in any way whatever.

The question remains, whether the *Apportionment Act*, 1870, applies. That Act cannot apply unless these profits are brought within the words "rents, annuities, dividends, or other periodical payments." Now to bring this case within the terms of the Act these profits must be either "dividends" or "periodical payments." I do not consider that they are dividends in any sense. A share of profits is properly called a dividend when declared in respect of shares taken in a trading concern. There is nothing in the word "dividend" which could apply, even in any loose or popular sense, to a share of profits such as this. The business in this case was the testatrix's own, and shares in the profits of that business are not made dividends merely because several persons are interested in them. If, instead of the profits being divided into four shares, the whole profits had been given to one tenant for life, it could not have been said that such tenant for life was taking a dividend when in fact he got the whole. Nor can you say that a person is taking a "dividend" because he only gets an aliquot part of that whole. Then as to these being "periodical payments," from the words which are associated with this expression in the Act of Parliament, viz., "rents, dividends, and annuities," I cannot consider a division of profits between several beneficiaries a "periodical payment" in any fair sense of those words within the meaning of the Act. I come to that conclusion independently of authority, but that conclusion is, I think, fortified by the observations of Lord *Selborne* in the case of *Jones* v. *Ogle* (1), referred to in the argument. I therefore hold that the Petitioner is entitled to the entire income in question.

Solicitors: *Bockett & Son; Stevens & King.*

(1) Law Rep. 8 Ch. 192.

V.-C. H.
1878
June 29.

MASSEY *v.* ALLEN.

[1876 M. 265.]

Registration of Shares—Repudiation of Ownership—Winding-up—Contributory—Assignment to Company of Right to be indemnified—Action by Liquidator in the Name of Assignor—Issue joined—Application to examine Defendant allowed—Companies Act, 1862, *s.* 115—*Costs.*

5 CLD 140, 1

M., at the request of *A.*, who afterwards repudiated the ownership in them, and alleged that it was in *H.*, agreed that shares in a company, subsequently ordered to be wound up, might be registered in his name as trustee. The shares were afterwards transferred to *W.*, and in the liquidation *M.* was placed in the B list of contributories, and was required to pay the call made. *M.* in 1876 assigned to the company all right to be indemnified by *A.* and *H.*, and under the power in the deed to sue in his name the liquidator, with the sanction of the Court, brought an action in *M.*'s name against *A.* and *H.*, to recover what was due on the shares, and for a declaration that they or one of them were or was bound to indemnify *M.* against all liability. Issue was joined in November, 1877. On an application by the liquidator under the 115th section of the *Companies Act*, 1862:—

Held, that *A.* was a person liable to be summoned, as being capable of giving information in reference to the assets of the company, and that he must attend before the special examiner to be examined and answer all relevant questions.

Statement.

THE Plaintiff, *John Daniel Massey*, was, in 1864, the chief cashier in the head office of the *Bank of London*, and the Defendant, *Charles J. H. Allen*, who was the secretary of the bank at that time, an intimate friend and his superior officer, requested him to allow 200 shares in the *International Contract Company, Limited*, to be registered in his name. He was informed that £5 a share had been paid up, and he agreed to the registration in his name as a trustee for *Allen*. The Plaintiff executed a transfer into his own name, but he did not obtain a certificate of his proprietorship in the shares. A further call of £5 a share was made, and became payable in December, 1864, and when *Allen* was informed of the fact he told the Plaintiff that the shares belonged to *Benjamin Hardwick* (a Defendant), and after some correspondence in reference to the shares the Plaintiff instituted a suit to compel *Hardwick* to pay the call and to accept a transfer of the shares. The suit was abandoned or compromised, but the

Ic on draft (copy for cort) 12 CLD 807.

result was a transfer of the shares in July, 1865, to *F. Wilkins*, of *Walthamstow*.

The company was, in July, 1866, ordered to be wound up, and in December, 1868, the Plaintiff received a notice from the liquidator that his name would be included in the B list of contributories for 200 shares.

On the receipt of the notice the Plaintiff wrote to *Allen*, who in reply said he would give the Plaintiff every assistance in his power in respect of this new liability; and *Allen's* solicitors wrote to *Hardwick*, calling upon him to indemnify the Plaintiff. *Hardwick's* solicitors, in January, 1869, in reply, stated that the shares were bought by *Allen* as agent of Mr. *Pickering*, and were registered in *Massey's* name, and he had no interest in them. *Wilkins* was registrar of the company and *Pickering's* nominee. After a correspondence between the parties, the Plaintiff was included in the list of contributories as a past member, and in April, 1870, he was required to pay a call of £20 a share. The Plaintiff again applied to *Allen*, and on his advice, and on the faith of his promise to become liable to the extent of £100 for costs, filed another bill against *Hardwick* for an indemnity, but after some time had elapsed no further proceedings were taken in the suit. Further correspondence took place between the Plaintiff and *Allen*, who asserted that he was not the real owner of the shares, and was not bound to indemnify the Plaintiff.

The Plaintiff, in February, 1876, in consideration of paying £100 to the liquidator, assigned to the company all right and title to be indemnified in respect of the shares by *Allen* or *Hardwick*, or by any other person, and all sums of money which might be recovered by the Plaintiff; and under the power given to sue in his name, and with the sanction of the Court, given in February, 1876, the liquidator, in the name of the Plaintiff, brought this action to recover the amount due on the shares, and claimed a declaration that the Defendants, or one of them, were or was bound to indemnify the Plaintiff against all liability in respect of the shares; and for consequential relief.

Allen, in his statement of defence, filed on the 15th of March, 1877, stated that the Defendant *Hardwick*, who was the solicitor of the company, called upon him at the bank, and said that he was

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about to receive some shares in the company, and had a desire that they should not be registered in his own name, and as he had arranged for their disposal, he asked *Allen* whether he would mind asking the Plaintiff to allow his name to be used as the transferee for a short time. *Allen* asked the Plaintiff, who was in the next office at the bank, and he saw *Hardwick*, and consented to his name being used. He denied that he was either the purchaser of the shares, or had had anything to do with them as proprietor, and asserted that the Plaintiff became a trustee for *Hardwick*.

Hardwick, in his statement of defence, filed on the 22nd of March, 1877, stated that *Allen* purchased the shares through his brokers with his own money, and that they were transferred by his direction into the name of the Plaintiff, who thereupon became trustee for him, and he denied that he was in any way interested in the purchase. He further stated that in 1864, *Allen* being indebted to him, he required the debt to be paid off or reduced, and *Allen* said he had these 200 shares, and requested *Hardwick* to sell them and apply the proceeds towards the satisfaction of the debt, and in pursuance thereof he sold the shares to *Pickering*, who paid him the purchase-money, which he applied towards satisfaction of the debt, and *Wilkins* took a transfer of the shares. The evidence of *Allen* and *Hardwick* as to what really took place in regard to the shares, and as to whom they belonged, was of the most conflicting character. Issue was joined in the action in November, 1877. A special examiner was a long time ago appointed to take evidence in any matter in the winding-up proceedings, and an order was obtained *ex parte* by the liquidator on the 13th of May, 1878, for the examination of *Allen*, but the course which had been taken in Chambers having been objected to as being irregular, an arrangement was come to that the matter should be adjourned into Court, and come on to be heard as if the witness had attended before the special examiner, and had refused to answer the questions which were put him.

Argument.

Dickinson, Q.C., and *Whitehorne*, for the liquidator, in support of the application, after referring to *Carver's Case*, which was before the Master of the Rolls on the 29th of May, 1877, and

where it appeared that his Lordship had, upon an *ex parte* application in Chambers, ordered *Carver*, who had been employed to sell the oil of the company, and who had refused to answer the questions put to him in reference to the transactions, to answer such questions; and to the decisions in *Ex parte Bateman* (1), *Ex parte Bloxam* (2), *Clement's Case* (3), *Druitt's Case* (4), and *Trower and Lawson's Case* (5), and *Buckley* on the *Companies Acts* (6), submitted that the proper order would be that *Allen* should attend before the special examiner and be sworn, and should answer the questions put to him, unless it should appear that any were objectionable, and if any were, they should be brought before the Court for its opinion upon them. The liquidator was desirous of learning whether he ought or ought not to proceed further with the action, and the Defendant *Allen* ought not to be allowed to say that he would not attend the examiner, but would leave the liquidator in the position of not being able to decide whether he should go on with the action or not.

Fellows, for the Defendant *Allen*:—

This application has been made under the 115th section of the *Companies Act*, 1862, which enacts that the Court may summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; but the Defendant *Allen* was never an officer of the company, had had no estate or effects of, was never indebted to, and never had any dealings with the company or with the Plaintiff *Massey*. The liquidator obtained the order in Chambers *ex parte*, on the decision in *Carver's Case*, which was very different from this case, and was no authority for the application, alleging that *Massey* held certain shares as a trustee for *Allen*, for which he ought to be indemnified, but that allegation has been denied, and nothing has been proved in the action, which is now ready for hearing. All

(1) 15 W. R. 118, 245.
(2) 36 L. J. (Ch.) 687.
(3) Law Rep. 13 Eq. 179, n.
(4) Law Rep. 14 Eq. 6.
(5) Ibid. 8.
(6) 2nd Ed. p. 546.

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the cases cited are distinguishable from the present. It ought first to be proved that *Allen* is liable to give the indemnity. The liquidator is not entitled to ask any question arising out of the action which is between *Massey* and *Allen* and *Hardwick*. He has no more right to further discovery than any Plaintiff has, and the Plaintiff could not ask for further evidence, but the liquidator, under the provisions of the 115th section, endeavours to obtain evidence which as a party to the action he would not be entitled to ask for. This is an unfair attempt on the part of the liquidator to obtain a sight of the Defendant *Allen's* brief because he had got the sanction of the Court to carry on the action, but he ought to be required to proceed with it as any other Plaintiff would have to do.

[He referred to *In re Accidental and Marine Insurance Corporation* (1), *Ingliby* v. *Shafto* (2), *Venables* v. *Schweitzer* (3), and *In re Lisbon Steam Tramways Company* (4).]

Judgment.

HALL, V.C.:—

The first question is, whether the Defendant *Allen* is liable to be summoned before the Court under the provisions of the 115th section of the *Companies Act*, 1862. It has been contended that he is not a person within the meaning of the language used, *i.e.*, "any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," which words, though a little varied, are substantially the same in the 117th section of the Act. There the word "trade" is left out and the word "affairs" inserted in its stead, which makes the meaning rather wider; therefore, any person who can give any information concerning the trade, affairs, dealings, estate, or effects of the company, *i.e.*, any person who can give material information in reference to increasing or protecting the assets of the company, is liable to be summoned, and the object of this action is unquestionably that of obtaining money from *Massey* or *Allen*, in whose shoes he stands, and by these means the company would be paid the calls on the shares. This case is analogous to *Carver's Case*. So much as to the construction of

(1) Law Rep. 5 Eq. 22.
(2) 33 Beav. 31.
(3) Law Rep. 16 Eq. 76.
(4) 2 Ch. D. 575.

the section itself. It was next contended that the authorities shew that this is a case in which the Court will not allow this section to be made use of. The first case referred to for the Defendant was *In re Accidental and Marine Insurance Corporation* (1), in which it was decided that a mere creditor of a company in liquidation who was not shewn to be capable of giving the information referred to in the 115th section is not a person to be examined under the section. It is not necessary for me to express any opinion whether that decision was correct or not, and therefore I will only add that I do not see the force of the reasoning upon which the conclusion come to was arrived at. The other cases were not proceedings under the section, and therefore cannot be directly applied to this case, and I cannot collect from those cases any principle which can guide the Court in reference to the exercise of its jurisdiction in such a case as the one now to be dealt with. Though those cases afford no guide, I think *Carver's Case* does. I can understand that a distinction might have been made if the action had not been brought, but not now that it has been brought. The Master of the Rolls considered that it was fit and proper that the witness should give his evidence in that case in defence, and in this it is in prosecuting, an action; but I can see no distinction between the two cases. There can be no cause of grievance to the witness whether he answers the questions put to him before the special examiner or in the witness box in this Court; therefore I shall order him to attend before the special examiner to be examined, and to answer the questions put to him. I cannot exclude any question relating to the matters in question, but must say that he is bound to answer everything relevant, and to give all the information in his possession in reference to the case. As the point is a new one, I shall make no order as to the costs of Mr. *Allen*.

Solicitors: *Lewis, Munns, & Longden; Stibbard, Gibson, & Co.*

(1) Law Rep. 5 Eq. 22.

V.-C. H.
1878
June 20;
July 2.

SMITH *v.* CONDER.

[1874 S. 306.]

Will—Sums advanced by Testator—Direction in Will to account—Letters, subsequently, writing off Amounts—Hotchpot.

Testator, who died in 1874, by his will, in 1864, gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot. He advanced to his two sons in and subsequent to 1869 several sums of money, and in 1873 he wrote a letter to each of them, stating that if he would give him a promissory note for the sum mentioned he would write off the balance:—

Held, that, regardless of the letters, the sons must bring the whole of the sums advanced to them into hotchpot.

Statement.

FURTHER consideration and summons to vary certificate.

This bill was filed in 1874 by *James Smith* (since deceased) and *Harriet* his widow (as administratrix under order to revive dated the 29th of April, 1878) for the purpose of obtaining a declaration that certain letters which passed between *John Brett* (Mrs. *Smith's* father), the testator in the cause, and *James Smith*, previously to the daughter's marriage, formed a contract which ought to have effect given to it, and asking that the trusts of the testator's will might be carried into effect, and that the rights and interests of the Plaintiffs and of the Defendants, *John Robert Brett* and *Arthur Brett*, and others interested in the estates, might be ascertained and declared, and for consequential relief.

John Brett, who died in February, 1874, by his will, dated the 18th of April, 1864, after making a provision for his wife and bequeathing some legacies, gave his real estate and the residue of his personalty to trustees upon trusts for sale and conversion, and investment of the proceeds, as therein mentioned, and for division amongst all his six children, two sons and four daughters, equally, the shares of the sons to be paid at twenty-one years of age, and of the daughters at twenty-one years of age or marriage; and he declared that all such sums of money as he had then already advanced or should thereafter advance to or for the benefit of his children as should appear in any account in his handwriting

kept by him for that purpose, or as should be shewn in any other manner, should be considered and taken in full for, or, as the case might be, in part of, his or her share of and in the trust estate. The testator made a codicil in April, 1866, but as it affected only the share of Mrs. *Smith* it is not material to be mentioned.

Statement.

A question had arisen in taking the accounts of the testator's personal estate in reference to the sums of money advanced by him to his two sons.

The testator wrote to his son *John Robert* a letter dated the 16th of January, 1873, in which he set forth the sums of money (in the aggregate £1575) which he had advanced to him, and stated in effect that if he would send him a promissory note for £935 he would write off the balance; and he wrote to his son *Arthur* a letter dated the 17th of January, 1873, in which he set forth the sums of money (in the aggregate £1760) which he had advanced to him, and stated in effect that if he would send him a promissory note for £1110 he would write off the balance.

The Chief Clerk, in his certificate dated the 16th of May, 1878, set forth the dates on which the various sums of money were advanced, all being, in *John Robert's* case, on and after the 17th of January, 1869, and in *Arthur's* case on and after the 28th of September, 1869; and in taking the accounts he had allowed, in the case of *John Robert*, £500 and £140, together £640, "amounts written off as a gift as per letter of testator dated the 16th of January, 1873;" and in the case of *Arthur*, £500 and £150, together £650, "amounts written off as a gift as per testator's letter dated the 17th of January, 1873."

The Chief Clerk having given effect to the letters to the sons, minutes had been prepared which proposed to carry out the certficate in not requiring the sons to bring into account the two sums of £640 and £650. This was a summons on the further consideration of the cause to vary the certificate, asking that the sons might be ordered to bring the two sums before mentioned into account, in accordance with the terms of the will.

Argument.

W. Pearson, Q.C., and *Romer*, for the Plaintiff.

Robinson, Q.C., and *Whitaker*, for the Defendants, the sons.

V.-C. H. 1878 SMITH v. CONDER.

Cozens-Hardy, for the Defendant *Thomas Conder*.

Lemon, for the Defendants *T. E. Conder* and his wife.

Carson and *Bidwell*, for other parties.

The cases referred to, excepting that of *Ex parte Pye* (1), are noticed in the judgment.

Judgment.

HALL, V.C.:—

I hold that the proviso in the will as to the advances made by the testator must have effect given to it regardless of the letters which are relied upon as shewing that the sons were not to be charged with more than the sums for which they were, as mentioned in those letters, to give promissory notes. The testator could not by his will by any express reference to future letters have incorporated such letters into his will, or regulated his dispositions in relation thereto: *Singleton* v. *Tomlinson* (2), and the letters are not admissible in evidence to construe or vary the operation of the will. *Kirk* v. *Eddowes* (3) is not an authority opposed to my opinion; on the contrary, the Vice Chancellor said that declarations of the testator made at any other time than contemporary with the advance were inadmissible. To admit the letters would be to allow of an alteration of the will by an instrument not properly executed as a will. This is not the case of a presumption sought to be rebutted, but a case of express declaration contained in a testamentary instrument, which declaration it is sought to displace by declarations contained in instruments not testamentary.

I may mention that I have looked at the cases of *Whateley* v. *Spooner* (4) and *Quihampton* v. *Going* (5). As to *Whateley* v. *Spooner* the marginal note is stated as follows:—"Direction in a will that all and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting should be brought into hotchpot:—*Held*, that a subsequent unattested statement in testator's

(1) 18 Ves. 140.
(2) 3 App. Cas. 404.
(3) 3 Hare, 509.
(4) 3 K. & J. 542.
(5) 24 W. R. 917.

handwriting was admissible in evidence of advances." I do not think that the marginal note accurately represents the Vice-Chancellor *Wood's* judgment. At all events, there is no such reference in the will in the present case to a statement as there was in the will in that case. In *Quihampton* v. *Going* (1), in which it was held that the entries in the ledger were conclusive, they were read as incorporated into the will, but the entries were all made previously to the date of the will.

V.-C. H. 1878 SMITH v. CONDER. Judgment.

Solicitors: *John Croft; B. E. Greenfield; F. Stanley; Aldridge, Thorn, & Morris.*

STIRLING-MAXWELL *v.* CARTWRIGHT.

V.-C. H. 1878 July 5

[1878 M. 28.]

Administration—Jurisdiction—Domicile—Scotch Assets—Limited Administration.

Where the Probate Division of the High Court of Justice had granted a general probate of the will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors.

Affirmed on Appeal 11 Ch. D. 522. C.A.

THE testator in this action, Sir *William Stirling-Maxwell*, of *Pollok* and *Keir*, was a domiciled Scotchman, and he made while at *Venice* a holograph will, which was unattested, but was validly executed according to the law of *Scotland*. By this will he appointed six persons his executors and the guardians of his infant sons, whose mother was dead, and to whom he left nearly the whole of his property. The testator had real estate of great value in *Scotland*, and personal estate there of the value of £200,000; he had no real estate in *England*, and his personal estate there consisted chiefly of a leasehold house, furniture, and library in *Grosvenor Street*, and was under £20,000 in value. Confirmation of the will was obtained by the executors in *Scotland*, upon production of which probate of the will in the ordinary form was granted to them by the Probate Division of the High Court of Justice, purporting to give them administration of all and singular

Statement.

(1) 24 W. R. 917.

V.-C. H. 1878

STIRLING-MAXWELL v. CARTWRIGHT.

the personal estate and effects of the deceased, the amount thereof being sworn under £20,000.

This action was then brought by one of the six executors, as the next friend of the infant sons of the testator, against the other five executors, in order to have his personal estate administered, and proper provision made for the maintenance and education of the infant Plaintiffs.

Argument.

Dickinson, Q.C., and *J. D. Davenport*, for the Plaintiffs, asked for an ordinary administration decree, without limiting it to the personal estate in *England*.

Hastings, Q.C., and *Macnaghten*, for the Defendants:—

The suit is entirely unnecessary, as due provision has already been made for the custody and education of the infant Plaintiffs; but if it is to continue, then, as the testator was a domiciled Scotchman, and all his real estate and by far the larger portion of his personal estate is in *Scotland*, any decree for administration to be made in this action should be limited to the English personalty, which alone can come to the executors by virtue of the English probate; and after payment thereout of the English debts, the balance of the English assets should be applied by the executors in accordance with the law of *Scotland*. This is what was done in *Preston* v. *Melville* (1).

The administration of the personal estate of a domiciled Scotchman belongs to the Scotch Courts, and it is settled that the English Court has no jurisdiction to deal with anything but the assets locally situate in *England*, and it administers them by satisfying the English claims, and by handing over the surplus to the Scotch representatives: *Enohin* v. *Wylie* (2).

The Court has no doubt frequently administered personal estates, parts of which have been locally situate abroad, but this has always been by consent, and there is no case in which it has done so against opposition. The decree must be in the form of that in *Preston* v. *Melville*.

[They also referred to *Cook* v. *Gregson* (3).]

(1) 15 Sim. 35; 8 Cl. & F. 1. (2) 10 H. L. C. 1, 15.
(3) 2 Drew. 547.

Dickinson, in reply:—

Argument.

In *Preston* v. *Melville* (1) the grant of letters of administration was limited to the personal estate in *England*, and the decree was limited accordingly; while in *Enohin* v. *Wylie* (2) the question was whether the English Courts would construe a foreign will, and that case is no authority for limiting the decree for administration to the English assets in a case where general probate of a Scotch will has been granted by the English Court.

HALL, V.C.:—

Judgment.

It appears to me that in this case the decree must be the ordinary decree, and not limited to the property in *England*. The only authority cited in favour of the proposition that the decree should be so limited is the case of *Preston* v. *Melville*; but there the grant of letters of administration was in terms limited to the personal estate in *England*, that is not so in the present case, the grant here being general.

I cannot say that in the course of my experience I ever met with a decree so limited. The Court is constantly dealing with estates portions of which are situate out of this country, and I never saw a decree limited to assets in *England*. The Court always, according to my experience, makes the ordinary decree. I say nothing as to what the Court would have done in case there had been proceedings in *Scotland*, and anything in the nature of a decree had been made there.

I see no reason why there should not in this case be the ordinary decree for administration. The decree must be so framed, and there must be an inquiry as to the outstanding personal estate in the usual form.

Solicitors: *Campbell, Reeves, & Hooper; Freshfields & Newman.*

(1) 15 Sim. 35; 8 Cl. & F. 1. (2) 10 H. L. C. 1, 15.

FRY, J.

1878

March 5.

FULLWOOD *v.* FULLWOOD.

[1876 F. 144.]

Lapse of Time—Injunction in Aid of Legal Right—Action of Deceit—Statute of Limitations.

10 Ch D 753, 24 Cl D 183

When an injunction is sought in aid of a legal right, the Court is bound to grant it if the legal right is established.

Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right.

To an action for an injunction to restrain the Defendant from representing that the business carried on by him was the same as that carried on by the Plaintiff, it was objected that the Plaintiff had known for between two and three years before issuing his writ the facts on which he relied:—

Held, that this delay was no bar to the action.

Statement.

THE Plaintiff, *R. J. Fullwood*, carried on the business of manufacturing annatto (a substance used for colouring cheese and butter), at 24, *Somerset Place, Hoxton*. The business was commenced by the Plaintiff's father at the same place in the year 1785, and he carried it on until his death in 1832. The Plaintiff and his three brothers, one of whom was the Defendant *Matthew Fullwood*, then succeeded to the business, but ultimately the right to carry it on became vested in the Plaintiff alone, and he carried it on under the firm of *R. J. Fullwood & Co.* In the year 1835 the Defendant *Matthew Fullwood* (who was entitled to make annatto from the same receipt as the Plaintiff, and to sell it under the same name) set up in *Buckingham Street, Strand*, a separate business of his own for the manufacture and sale of annatto, and carried it on under the firm of *M. Fullwood & Co.* In the year 1873 he took the Defendant *Edward Fullwood* into partnership with him, and the business was afterwards carried on under the firm of *E. Fullwood & Co.* The Defendant, *E. Fullwood*, had previously carried on at 1 and 2, *Somerset Place, Hoxton*, the business of an importer and manufacturer of asphalte, under the firm of *E. Fullwood & Co.* He discontinued that business shortly after the commencement of his partnership with the other Defendant.

See also cases cited in Fullwood v. Fullwood, 10 Ch. D. 753, 24 Cl. D. 183

The Defendants sent out with the annatto which they sold, and distributed in other ways, a card as follows:—

"Established over 85 Years.
"*E. Fullwood & Co.*,
"(late of *Somerset Place, Hoxton*),
"Original Manufacturers of Liquid and Cake Annatto,
"Wholesale and for Exportation,
"19, *Buckingham Street, Strand.*"

Over the words *E. Fullwood & Co.* there was printed as a trade-mark the head of the Queen, which differed from the Plaintiff's trade-mark, which was a stag. The Defendants also placed round the bottles in which they sold their annatto a wrapper resembling that which the Plaintiff used, there being printed on it the words

"*E. Fullwood & Co.*,
"Annatto and Antiseptic Manufacturers,
"19, *Buckingham Street, Strand, London,*
"Established 1785."

The Plaintiff alleged that the effect of these cards and wrappers was to represent that the business of the Defendants was the same as that of the Plaintiff, and that the annatto sold by them was manufactured by the Plaintiff, and he claimed an injunction. The writ was issued on the 14th of November, 1876. By their statement of defence the Defendants alleged that "the Plaintiff has known for a period of at least between two and three years all the material facts stated in the pleadings in this action, and in the early part of the year 1875 he added to his public advertisements the words following: 'The parties lately advertising *Fullwood's Annatto, Buckingham Street, Strand,* have no title to make use of the address *Somerset Place, Hoxton, London.*' And the Defendants submit that after such a lapse of time this action cannot be sustained."

This was the trial. The Plaintiff adduced no evidence to shew that any persons intending to deal with him had been deceived.

Fischer, Q.C., and *Whitehorne*, for the Plaintiff:—

The Defendants' cards and wrappers are calculated to deceive.

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Argument.

Churton v. *Douglas* (1) is an authority in our favour. There has been no delay such as to disentitle the Plaintiff to relief.

North, Q.C., and *T. L. Wilkinson*, for the Defendants:—

Our cards and wrappers are not calculated to deceive. At any rate, the Plaintiff has not been prompt enough in coming to the Court.

[FRY, J.:—The rule that a Plaintiff must be prompt applies to the discretionary jurisdiction of the Court. But this action is in the nature of an action for deceit, the injunction is only sought in aid of a legal right. Can the Court cut down the limit of six years imposed by the *Statute of Limitations* on the assertion of the legal right? The matter was discussed in *Gaunt* v. *Fynney* (2).]

In the old Court of Chancery parties were often left to their legal rights on the ground of delay: *Kerr* on Injunctions (3); *Cooper* v. *Hubbuck* (4); *Richards* v. *Revitt* (5).

Judgment.

FRY, J.:—

In my judgment this is a very plain case. Of course I need not say that the Defendants are entitled to carry on their business under the firm which they have adopted, if they are so minded, and to carry it on where and as they like, provided that they do not represent themselves to be carrying on the business which has descended to the Plaintiff.

But it appears to me that by the cards and wrappers which the Defendants are proved to have used, they have been attempting to represent that the business which they carry on is the business of which the Plaintiff is now the proprietor. The only defence which it is necessary for me to observe upon is this. It is said that in 1875 the Plaintiff became aware of what the Defendants were doing. Now, assuming, as I will, for the purpose of my decision, that in the early part of 1875 the Plaintiff knew of all the material facts which have been brought before me to-day, he commenced his action in November, 1876. In my opinion that delay,

(1) Joh. 174. (3) 2nd Ed. p. 372.
(2) Law Rep. 8 Ch. 8. (4) 30 Beav. 160.
(5) 7 Ch. D. 224.

and it is simply delay, is not sufficient to deprive the Plaintiff of his rights. The right asserted by the Plaintiff in this action is a legal right. He is, in effect, asserting that the Defendants are liable to an action for deceit. It is clear that such an action is subject to the *Statute of Limitations*, and it is also clear that the injunction is sought merely in aid of the Plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course if the legal right be proved to exist. In saying that I do not shut my eyes to the possible existence in other cases of a purely equitable defence, such as acquiescence or acknowledgment, and the various other equitable defences which may be imagined. But mere lapse of time, unaccompanied by anything else (and to that I confine my observations) has, in my judgment, just as much effect, and no more, in barring a suit for an injunction as it has in barring an action for deceit. In my judgment, the same rule applies since the *Judicature Act* as formerly applied in the Court of Chancery when the legal right had to be determined in an action at law. There is, therefore, no defence to this action, and the injunction must go. It will be to restrain the Defendants, &c., from publishing or continuing to publish, and from distributing, any of the cards or wrappers to which I have referred (of course they must be identified), and from representing or stating that the business now or formerly carried on by the Defendants in the manufacture and sale of annatto was established in or about the year 1785, or that it has been lately carried on at *Somerset Place, Hoxton;* and from representing that the said business is identical with, or in any way connected with, the Plaintiff's business; and also from representing that the annatto manufactured and sold by the Defendants is manufactured by the Plaintiff. The Defendants must pay the costs of the action.

Solicitors for Plaintiff: *Nash & Field.*
Solicitors for Defendants: *Wilkins, Blyth, & Fanshawe.*

Applied. BASMA *v.* WEEKES. [1950] 2 All E.R. 146.

Approved. BASMA *v.* WEEKES [1950] A. C. 441

FRY, J.
1878
March 27.

HORROCKS *v.* RIGBY.

[1877 H. 220.]

Vendor and Purchaser—Specific Performance—Vendor entitled to Part only.

Where two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:—

Held, that a judgment for specific performance with abatement might be made against the former.

Statement.

W. E. RIGBY and *William Henry Linell* claimed to be entitled to a public-house and other hereditaments at *Macclesfield* for the residue of a term of 999 years, and by an agreement made on the 16th of January, 1877, between *Rigby* and *William Henry Linell* of the one part, and the Plaintiff *T. Horrocks* of the other part, *Rigby* and *William Henry Linell* agreed to sell, and the Plaintiff to purchase, the public-house and other hereditaments, subject to the annual chief or ground-rent of £36 or thereabouts, and also subject to a mortgage thereon for £400, and other incumbrances (if any), and lessees' covenants and conditions affecting the same, for the sum of £200.

On examining the title it was discovered that *William Henry Linell* had no interest in the property, but that *Rigby* was entitled to one moiety thereof, and one *Henry Richard Linell* to the other moiety. It was further found that the mortgage mentioned in the agreement was a mortgage of only the moiety of the property belonging to *Rigby*, on which the sum of £240 remained due at the date of the contract to *R. Clarke*, the mortgagee. *Clarke* afterwards agreed to purchase the whole, and on the 27th of August, 1877, took a conveyance of the legal estate from *Rigby* and *Henry Richard Linell*.

Horrocks was willing to accept performance of the contract as to *Rigby's* moiety, on an abatement from the purchase-money and an apportionment of the chief rent, and brought this action against *Rigby* and *Clarke*, praying that *Rigby* might be ordered specifically to perform the said contract so far as his moiety of the pro-

perty was concerned, and that he and *Clarke* might be ordered to assign to the Plaintiff the said moiety for the residue of the term for which the property was held, subject to the payment of one half part of the chief rent issuing out of the entirety of the said property, with an abatement from the said purchase-money of one half thereof, and that the purchase-money payable in respect of such moiety might be paid to *Clarke* towards the discharge of his mortgage debt.

Statement.

The Defendants *Rigby* and *Clarke*, by their statements of defence, took several objections to the performance of the contract as to the moiety, which objections were either abandoned at the hearing or overruled by the Court, and *Clarke*, by counterclaim, sought a foreclosure; the only questions raised which call for a report being whether specific performance as to one moiety would, under the circumstances, be granted, and how the mortgage to *Clarke* was to be dealt with.

Cookson, Q.C., and *F. T. Procter*, for the Plaintiff:—

Argument.

The purchaser has a right to take so much of the property as the person who has contracted to sell may have: *Sugden's* Vendors and Purchasers (1); *Hooper* v. *Smart* (2); *Barnes* v. *Wood* (3); *Attorney-General* v. *Day* (4); *Dart's* Vendors and Purchasers (5). *Jones* v. *Evans* (6) was a peculiar case. As to the mortgage money, the Plaintiff has a right to set off the purchase-money as far as it goes. No doubt *Rigby* will not receive anything, but the contract is not without consideration, as he will be relieved from the debt and from the liabilities under the covenants in the lease.

Fillan, for *Rigby*:—

Decreeing specific performance in such a case is discretionary: *Hooper* v. *Smart* (7); and will not be exercised where the injustice is too great. Here *Rigby* will actually receive nothing. In *Wheatley* v. *Slade* (8) specific performance under similar circumstances was refused.

(1) 13th Ed. pp. 257, 263.
(2) Law Rep. 18 Eq. 683.
(3) Ibid. 8 Eq. 424.
(4) 1 Ves. Sen. 218.
(5) 5th Ed. p. 1066.
(6) 12 Jur. 664.
(7) Law Rep. 18 Eq. 683–685.
(8) 4 Sim. 126.

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Judgment.

North, Q.C., and *Warmington*, for *Clarke*.

FRY, J., after stating the facts of the case, continued:—

The Plaintiff is, therefore, incumbered with several difficulties in respect of this contract. In the first place, he has entered into a contract with two persons as tenants in common for the sale of the entirety. It is found that one of those supposed tenants in common has no interest whatever in the property, and the question then is, whether the Plaintiff can enforce against the other a conveyance so far as it relates to his moiety.

In my opinion the Plaintiff can enforce it. I think that where an agreement is entered into by *A.* and *B.* with *C.* and it afterwards appears that *B.* has no interest in the property, *A.* may nevertheless be compelled to convey his interest to *C.* I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord *Hardwicke* in *Attorney-General* v. *Day* (1). There he was dealing with the case of a contract entered into between tenants in common in tail, and he assumes the death of one of them leaving heirs in tail. He points out that whereas the contract could have been enforced against the contracting tenant in tail, it could not be enforced against the issue of the tenant in tail because they claim *per formam doni*, and are not subject to the contract of the previous tenant in tail. He points out further that the one tenant in tail could not enforce against the purchaser the performance of the contract with regard to the moiety of which he was possessed; but, contemplating the alternative case, that of the enforcement of the contract by the purchaser against the vendor, Lord *Hardwicke* says (2): "On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate, the purchaser brings a bill against the survivor desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the

(1) 1 Ves. Sen. 218. (2) 1 Ves. Sen. 224.

estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other." It appears to me to be immaterial whether the impossibility arises from the death of the contracting party leaving heirs in tail who take *per formam doni*, or from the fact that one of the contracting parties cannot perform the contract. Lord *Hardwicke's* opinion is that the inability with regard to one moiety would not preclude the purchaser from having performance with regard to the other moiety, and I so hold.

The next question which arises is this. It appears that instead of the entirety of the property being subject to the mortgage, one moiety of the property only is subject to the mortgage, and the question is, what is the effect of that as to the purchase-money which would be payable in respect of that moiety. Now, taking this particular case, £200 being the purchase-money for the entirety of the equity of redemption, £100 would obviously be the purchase-money to be paid to *Rigby* for his moiety if there were no incumbrances; but there is an incumbrance on that moiety. The reason of the case, therefore, requires that inasmuch as the purchaser can get only the moiety of the equity of redemption, and has to bear, not the moiety but the entirety, of the incumbrance, that the one moiety of that incumbrance which he did not expect to bear should be set off against the purchase-money which he did expect to pay.

The result is, that the vendor, by representing that the incumbrance was upon the entirety and not upon the moiety, has cast upon the moiety an amount of incumbrance which neither he nor the purchaser contemplated as falling on that moiety. But it being conceded in this case that the purchase-money of the moiety was £100, and that the mortgage upon that moiety exceeds £200 by more than £100, it follows that the deduction so to speak, from the purchase-money is larger than the purchase-money itself, and that no sum at all will come to the vendor *Rigby*. Therefore, all I can do is to say, that, in my judgment, the Plaintiff is entitled to a conveyance of *Rigby's* moiety upon entering into covenants to pay the rent, and to perform the covenants in the original

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lease, and to pay the entire mortgage money and interest due to *Clarke*, and to indemnify *Rigby* in respect of those liabilities.

It has scarcely been suggested on behalf of the Defendants in this case, that such a contract could not be enforced, because no consideration was moving from the Plaintiff to *Rigby*. That contention, if it had been seriously made, would not be sustainable, because it is quite evident that the covenants into which the Plaintiff enters with *Rigby* are valuable consideration. The case of *Price* v. *Jenkins* (1) would be ample to cover that point.

The question remains to be considered, what am I to do with the costs of this action. [His Lordship concluded that as both *Rigby* and *Clarke* had set up untenable defences, and as *Clarke* was a necessary party, having chosen to take a conveyance of the legal estates, the Defendants must pay the costs of the suit; but there must be judgment for *Clarke* on his counter-claim as in an action for foreclosure.]

Declare that the Plaintiff is entitled to an assignment of one moiety of the property so far as the interest of *W. E. Rigby* in the same is concerned, subject to *Clarke's* mortgage. Order that *W. E. Rigby*, and *Clarke* so far as he may be interested in the said premises by virtue of the said indenture of the 27th of August, 1877, do execute an assignment of the same to the Plaintiff, such assignment to contain the usual covenants on the part of the Plaintiff to pay rent, keep down interest on incumbrances, and to indemnify *W. E. Rigby*.

Direct accounts of what is due to *Clarke*, deducting the Plaintiff's costs of the suit.

Upon the Plaintiff paying to *Clarke* what shall be certified to remain due to him, *Clarke* do, at the costs of the Plaintiff, re-assign, &c.; but in default of the Plaintiff paying to *Clarke* what shall be so certified to remain due to him as aforesaid, the Plaintiff is to be foreclosed, &c.

Solicitors for Plaintiff: *Stephens & Stephens.*

Solicitors for Defendants: *Andrew & Wood*, agents for *J. W. Johnston, Stockport.*

(1) 5 Ch. D. 619.

PELLING *v.* GODDARD.

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1878

March 13, 28.

[1876 P. 271.]

Trustee Relief Act (10 & 11 *Vict. c.* 96), *s.* 2—*Payment Out—Petition—Action.*

Applications for payment out of Court of a fund paid in under the *Trustee Relief Act* must be made by petition and not by action; and a person not named in the trustee's affidavit may petition for payment out of Court. But where an action has been brought the Court may make a declaration of right, leaving the payment to be obtained on petition.

Statement.

JAMES FOSBURY by his will gave £1300 (subject to an annuity) to his niece for life, and after her death to her children, *Catherine Vass, Eliza Sparke, Esther Ottway, Benjamin Williams,* and *J. F. Williams. Catherine Vass* and *Benjamin Williams* afterwards assigned their shares to *J. F. Williams,* who, in 1862, made an assignment by a creditors' deed, under the Bankruptcy Acts, to *Harry Pelling.* On the 11th of March, 1872, *Ellen Goddard,* the personal representative of *James Fosbury,* paid into Court, under the *Trustee Relief Act,* £413, as the shares of *Catherine Vass, B. Williams,* and *J. F. Williams,* the rest of the fund having been previously divided. *Ellen Goddard* by her affidavit stated that to the best of her knowledge and belief *Catherine Vass, Benjamin Williams,* and the personal representatives of *J. F. Williams,* who was dead, were the only persons entitled to the trust funds; not mentioning the assignment to *J. F. Williams,* or the proceedings in his bankruptcy.

The personal representatives of *Harry Pelling* brought an action against *Ellen Goddard* and her husband, *Catherine Vass, Benjamin Williams,* and *Horatio Williams* the personal representative of *J. F. Williams,* claiming payment of the fund in Court.

Argument.

Cookson, Q.C., and *C. Browne,* for the Plaintiffs.

North, Q.C., and *Philpot,* for the Defendants, objected that the application ought to have been made by petition and not by action: *In re Hodges* (1). The fund is not under the ordinary

(1) 4 D. M. & G. 491.

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jurisdiction of the Court, but under the statutory jurisdiction created by the *Trustee Relief Act* (10 & 11 Vict. c. 96), the 2nd section of which is distinct, that the application is to be by petition. No doubt the 6th of the Chancery Funds Amended Orders (1) does speak of the persons named in the affidavit, but it is clear that the Act cannot be restricted. If it were, and all the persons named in the affidavit were dead, the fund could never be got out. It is clear that any one entitled can petition: *In re Puttrell's Trusts* (2), and that the money cannot be paid out in an action.

Cookson, in reply:—

A petition can, under the Order, be presented only by a person described in the Order: *Daniell's* Chancery Practice (3); and any other person must proceed by action, which is not excluded by the Act: *Re Jephson* (4); *Crause* v. *Cooper* (5).

Judgment.

March 28. FRY, J., after deciding on the questions raised in the action, that the Plaintiffs were entitled to the fund in Court, continued:—

But it is said that the money in question was paid into Court under the *Trustee Relief Act*, under which relief can be had only upon petition, and that if the Plaintiffs require payment out of Court of the money they must apply by petition and not by action. The Plaintiffs say, that so far from that being the rule, they could not have obtained an order for payment by petition, and must bring an action. In order to settle this question it is necessary to refer to the *Trustee Relief Act* (10 & 11 Vict. c. 96). [His Lordship then read parts of the 1st, 2nd, and 4th sections of the Act.] Then the 6th of the Chancery Funds Amendment Orders, which in substance repeats the 41st General Order made under the *Trustee Relief Act*, says that "The persons interested in or entitled to any money or securities so paid or transferred into or deposited in Court in pursuance of the said Act of 10 & 11 Vict. c. 96, and named in the affidavit, or any of

(1) Morg. Acts and Orders, 5th Ed. p. 66.
(2) 7 Ch. D. 647.
(3) 5th Ed. p. 1790.
(4) 1 L. T. (N.S.) 5.
(5) 1 J. & H. 207.

such persons, or the person so paying or transferring into or depositing in Court may apply by petition, or, in cases where the fund does not exceed £300 cash or £300 in securities, by summons, as occasion may require, respecting the investment, payment out, or distribution of the money or securities, or of the dividends or interest of such securities."

The difficulty here arises from this, that the trustee in her affidavit did not name the Plaintiffs among the parties interested, and the question I have to decide is whether, in that state of circumstances, the Plaintiffs could have applied by petition. Now, in the first place, the Act unquestionably relieves a trustee who has paid in the money, and it then provides for an application by petition, and by petition only. The result would be, if the Plaintiffs' contention is correct, that after the money is paid into Court and the trustee is discharged, a person interested in the fund could not apply by petition if the trustee, through ignorance or inadvertence, happened to omit the name of that person.

That is a conclusion at which I ought not to arrive unless the Order expressly compels me to do so. Now, the second section of the Act in saying that "such Orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust moneys," evidently refers to orders to be made on petition or on summons, not to General Orders, and then the persons who may petition are "such party or parties as to the Court shall appear to be competent and necessary in that behalf." The discretion of the Court is not required to be exercised by way of General Order, and it is evident that the competence and necessity of the person who is to petition is a thing which must be judged of by reference to the trust fund and to the instruments creating the trusts. It is quite true that by the 4th section a power is given to the Court to make General Orders, but that is evidently not intended to interfere with the power given to the Court in the 2nd section of making orders with reference to the particular fund in Court.

That being so, it appears to me that I am bound to construe the General Order strictly, and to give effect to it in such manner as will, if possible, fit in with the scheme of the Act under which it was made. Now the language of the General Order to which I

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have referred is purely permissive. It is that the persons named in the affidavit "may apply" by petition. It does not say that nobody else may apply. There are no negative words. Those persons named may certainly apply, and it is left to the discretion of the Court to say in each case whether a person not named in the affidavit is nevertheless competent to apply to the Court by petition. The result is, that in my judgment the Plaintiffs might have come to the Court on the ordinary petition and have so obtained a direction for payment out of this fund.

I may add that I have made some inquiry with reference to the practice, and I find that the practice has been to allow petitions to be presented by persons not named in the affidavit of the trustees.

Having come to that conclusion, the next question is whether the result is that the Plaintiffs should not have brought this action? It is said by the Defendants that that is the result, because the jurisdiction is purely statutory, and the Court has no power to order payment out on anything but a petition. I agree that I cannot make an order for payment out of Court except on petition, but it appears to me that there is nothing in the Act to take away the ordinary jurisdiction of the Court to make declarations with regard to persons interested in a trust fund wherever that fund may be. I shall therefore make a declaration that the Plaintiffs are entitled to the fund, and I shall direct a petition to be presented in order to obtain payment of the money out of Court.

Solicitors for Plaintiffs: *Denton, Hall, & Barker.*
Solicitors for Defendants: *Roberts & Barlow.*

BRADLEY *v.* RICHES.

FRY, J.

1878

May 1, 2.

[1876 B. 128.]

Mortgage—Priority—Trustee—Solicitor—Possession of Deeds—Register—Notice.

The Plaintiff through his solicitor contributed £500 and the solicitor £300 to a loan of £800 on deposit of deeds. The solicitor subsequently took a mortgage to himself for the £800. The solicitor afterwards deposited the title-deeds of the mortgaged property with a bank as security for a loan of £400:—

Held, that the Plaintiff had priority for his £500 over the security to the bank.

The Plaintiff had lent money to a solicitor on the security of the deposit of title-deeds of land in *Middlesex* with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:—

Held, that the client must be presumed to have had notice of the Plaintiff's charge, which therefore, though unregistered, retained priority.

The presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.

15 Ch D 641
16 Ch D 181.
19 Ch D 209
211
21 Ch D. 384
694

Statement.

THIS was an action for foreclosure brought by *W. G. Bradley*, the mortgagee, against *Henry Jonathan Riches*, the mortgagor, and *Thomas Brooks*, the trustee in the bankruptcy of *Riches*, and against the *Union Bank of London*, mortgagees of part of the property mortgaged to *Bradley*, and against the Rev. *F. T. Woodman*, mortgagee of other part, the Plaintiff claiming priority over the bank and over Mr. *Woodman*.

The case as between the Plaintiff and the bank was as follows: In the month of July, 1870, *Riches*, who was the solicitor of *Bradley*, asked him to advance £500 towards a loan of £800 to one Dr. *Kenny*, on the security of a house at *Richmond*, called *Arundel Villa*, *Riches* advancing the other £300. *Bradley* accordingly gave *Riches* £500, and received from him a letter, dated the 27th of July, 1870, as follows:—

"I acknowledge that you advanced my client, Dr. *William Kenny*, of *Arundel Villa*, *Richmond*, the sum of £500 on the secu-

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rity of his house (as above), and upon which property I have made an additional advance of £300, making together £800; and under the terms upon which the loan was advanced I engage as well on my part as that of my client to repay the loan on demand, together with interest thereon at and after the rate of £6 per cent. per annum from the date of such advance until liquidation; and I further engage, if called upon by you, to deliver over the title-deeds to you and in the meanwhile to hold them to your order."

It did not appear when the £800 was advanced to Dr. *Kenny*, but by an indenture of mortgage dated the 31st of January, 1873, made between Dr. *Kenny* of the one part and *Riches* of the other part, in consideration of the sum of £800 stated to have been advanced to Dr. *Kenny* by *Riches*, Dr. *Kenny* granted and demised the house at *Richmond* to *Riches* for the residue of a term of eighty-nine years, by way of mortgage to secure the repayment by Dr. *Kenny* to *Riches* of the sum of £800, together with interest thereon after the rate of £5 per cent. per annum.

On the 6th of June, 1873, *Riches* obtained from the *Union Bank of London* an advance of £400, and deposited with the bank the title-deeds relating to the house at *Richmond*, including the mortgage deed, and also gave the manager of the bank a letter charging as security for the £400 the house at *Richmond* of which he was the mortgagee as aforesaid, and agreeing to execute a proper legal mortgage of the said security whenever called upon. The title-deeds had remained in the possession of the *Union Bank*, and the bank alleged that they had advanced the £400 in the belief that the said sum of £800 belonged entirely to *Riches*, and they denied that they had any knowledge of any interest of *Bradley* in the mortgage until December, 1876, *Riches* having on the 16th of September, 1876, been adjudicated bankrupt.

rgument.

North, Q.C., and *Speed*, for the Plaintiff.

Cookson, Q.C., and *Bardswell*, for the *Union Bank*:—

This mortgage was made to *Riches* as if the money was his own. He had the deeds, and the bank could have no means of knowing that the money was not his own. If the beneficial owner allows his trustee to deal in this manner, the loss should fall upon him,

and not upon others whom he has allowed to be misled. Mr. *Bradley* should have taken the deeds: *Eyre* v. *Burmester* (1); *Layard* v. *Maud* (2); *Stackhouse* v. *Countess of Jersey* (3); *Perry-Herrick* v. *Attwood* (4).

Argument.

[FRY, J., referred to *Shropshire Union Railways and Canal Company* v. *Reg.* (5).]

No doubt as a general rule a man has a right to leave his deeds in the possession of his solicitor, but here he has allowed his solicitor to appear as the owner of the money also. Why did not Mr. *Bradley* have a memorandum indorsed on the mortgage deed? Besides, the money was advanced in 1870, and the mortgage was not made until 1873, and is at a different rate of interest; nor has the Plaintiff's money been traced in any way. In fact, he allowed *Riches* to have £500, and is now only a general creditor on the estate of *Riches* for that amount. What defence would the bank have against the trustee in *Riches'* bankruptcy claiming all this money?

Judgment.

FRY, J., after stating the facts of the case, continued:—

It is clear that the £500 paid by the Plaintiff was held by *Riches* on an express trust to make an advance to Dr. *Kenny*, and that any security taken for the £800 would be held by *Riches* as to £500 as trustee for the Plaintiff; and I do not think that the engagement to deliver over the deeds, and in the meanwhile to hold them to the order of the Plaintiff, deprived the Plaintiff of his rights as *cestui que trust.* Whether *Riches* did or did not advance the £800 in 1870, does not appear, but it is certain that on the 31st of January, 1873, Dr. *Kenny* executed a mortgage of this same property, in which he acknowledged the receipt of £800, and agreed to pay interest at the rate of 5 per cent., and not 6 per cent. Now, pausing there, it appears to me that from the moment of the execution of that mortgage *Riches* was a trustee of it for the Plaintiff to the extent of £500. It is said on behalf of the *Union Bank* that *Riches* himself or his trustee in bankruptcy could claim the £800 and deny the trust, and for that the autho-

(1) 10 H. L. C. 90.
(2) Law Rep. 4 Eq. 397.
(3) 1 J. & H. 721.
(4) 2 De G. & J. 21.
(5) Law Rep. 7 H. L. 496.

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rity of *Middleton* v. *Pollock* (1) is cited. In that case money had been placed in the hands of *Pollock* by *Wetherall*, who had been informed by *Pollock's* clerk that he proposed to invest the money in property at *Camden Town*, and *Pollock* afterwards wrote that the money was put out at 5 per cent., "as my clerk arranged with you." The Master of the Rolls directed that the Plaintiff should be satisfied by further evidence that money had in fact been advanced to certain builders before the writing of the letters. It appears to me that that case does not decide what it has been said to decide. The only letter written was in general terms, and it said that the money had been advanced. If it had not been advanced, the property comprised in any subsequent security was not the property mentioned in the letter, and the Petitioner would have failed to prove the identity, and the money would form part of the general estate. But it does not appear to me that in the present case *Riches* could have claimed the whole against the Plaintiff.

If I am right in the conclusion I have come to, it is clear that the deposit with the *Union Bank* was a gross breach of trust; and it appears to me that the case is simply one in which, to use the language of Lord Justice *Turner* in *Cory* v. *Eyre* (2), the bank "are claiming priority over *cestuis que trust* under a breach of trust committed by their trustee." In cases of this sort it is familiar law that *qui prior est tempore potior est jure*. That priority no doubt may be displaced by shewing negligence or fraud on the part of the mortgagee, who is earlier in time, or by shewing a better equity on the part of the later mortgagee, but one or the other of those things must be shewn.

Now, what circumstances of negligence or fraud are there in this case? On which ground does a posterior equity assert itself to be better? The only argument addressed to me on that point is this. It is said that it is negligence for a man to take a security in the name of another when there is no reason for doing so, and that *Bradley* ought not to have allowed the mortgage to be taken in the name of *Riches*, and ought either to have had an indorsement on the deed, or to have obtained possession of the title-deeds, and thereby have deprived *Riches* of the power of dealing in the way in which he has dealt. It appears to me that that argument

(1) 4 Ch. D. 49. (2) 1 D. J. & S. 149, 167.

is not only absolutely inconsistent with the decision in *Cory* v. *Eyre* (1), but also with the decision of the House of Lords in the *Shropshire Union Railway and Canal Company* v. *Reg.* (2). There the Lord Chancellor expressed in very emphatic language the right of every man to take a security in the name of another, and that a man having done so could not have negligence imputed to him for not watching his trustee.

The next argument was that this principle did not apply here, as a portion of the fund was contributed by the trustee. In point of principle I cannot see any difference between the cases, for the mortgagee may be a trustee of the whole or of part of a fund, but that very circumstance occurred in *Cory* v. *Eyre*, and the Lord Justice *Turner* dismissed it from his consideration as creating no substantial difference. He says (3), "It was attempted on the part of the Appellants to make some distinction in this case upon the ground that the mortgage is what is called a contributory mortgage, a mortgage in which several persons are beneficially interested, but I see no distinction which can be made upon this ground." I hold, therefore, that the principle of priority of time applies, and that there is nothing to displace it, and that the Plaintiff's right to the £500 is prior to any right of the bank, and I make a declaration accordingly.

His Lordship further decided that the security would not be apportioned between the Plaintiff and the bank, but that the Plaintiff would have priority over the bank for the £500 and interest.

The case as between the Plaintiff and *Woodman* was then heard.

Jonathan Riches, who died in 1843, by his will left considerable freehold and leasehold house property in *Middlesex* to his wife (since deceased) for life, and after her death to his two children, *H. J. Riches* above mentioned and Mrs. *Woodman* (since deceased), wife of the Defendant *Woodman*. All his house property appeared to have been subject to mortgages, so that the legal estates

(1) 1 D. J. & S. 149. (2) Law Rep. 7 H. L. 496, 507.
(3) 1 D. J. & S. 169.

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were outstanding. In 1870 *Riches* obtained from the above-mentioned Plaintiff *Bradley* an advance of £1000 on a house in *Finchley Road*, and £1000 on two houses in *Paddington*, both parts of the estate of *Jonathan Riches*. In February, 1874, *Riches* obtained from *Bradley* a further advance of £3000 Consols, on the security of *Riches'* one-half of his father's estate. The securities were effected by the deposit of deeds, and by letters from *Riches* to *Bradley*.

Riches had acted as the solicitor of *Woodman*, but the accounts of *Jonathan Riches'* estate remaining unsettled and a balance being due from *Riches* to *Woodman* for money lent, *Woodman*, in 1874, employed Messrs. *Awdry & Clarke* as his solicitors, who had a correspondence on the subject with *Riches*, and pressure was put upon him. Ultimately, by an indenture of mortgage dated the 24th of May, 1875, expressed to be made in consideration of the sum of £4400 due to *Woodman* in right of his wife, and of divers other sums of money paid by *Bradley* to and partly on account of *Riches* (the last-mentioned sums, together with the said sum of £4400, amounting to £10,490), *Riches* assigned to *Woodman* (with other property) all the interest of him *Riches* in the real and personal estate of his father, *Jonathan Riches*, to secure the aforesaid principal sum of £10,490 then due to *Woodman*, and interest thereon. This deed was registered in the Registry of Deeds in *Middlesex*.

Bradley now claimed priority for his securities over this mortgage, though registered, on the ground that in the preparation of the mortgage *Riches* had been the solicitor of *Woodman*, the mortgagee, who was therefore affected with notice of the securities to *Bradley*. Evidence was gone into on the question whether *Riches* did act as solicitor to *Woodman* in the preparation of the mortgage, the effect of which is stated in the judgment given below.

Argument.

North, Q.C., and *Speed*, for the Plaintiff, cited *Moore* v. *Culverhouse* (1), overruling *Wright* v. *Stanfield* (2); *Neve* v. *Pennell* (3); *Essex* v. *Baugh* (4); *Le Neve* v. *Le Neve* (5).

(1) 27 Beav. 639.
(2) Ibid. 8.
(3) 2 H. & M. 170.
(4) 1 Y. & C. Ch. 620.
(5) 3 Atk. 646.

Cookson, Q.C., and *Whitehorne*, for *Woodman*:— Argument.

The Act 7 Anne, c. 20, imposes a duty to register as against those who come afterwards, and if a man neglects that duty he must not complain if he is a loser. We have a registered deed, and in order to deprive us of the benefit of our diligence we must be clearly affected with notice: *Wyatt* v. *Barwell* (1). The Defendant denies that *Riches* was his solicitor in this matter, but even if it is held that he was the solicitor, the presumption of notice to the client may be rebutted: *Kennedy* v. *Green* (2). *Riches* had every motive to conceal the previous mortgages, and the fact of his not having registered them shews that he had a fraudulent intention: *Waldy* v. *Gray* (3); *Rolland* v. *Hart* (4); *Atterbury* v. *Wallis* (5). It is merely a presumption that a solicitor communicates everything to his client, and here the presumption is strongly the other way: *Hewitt* v. *Loosemore* (6); *Espin* v. *Pemberton* (7); *Greenslade* v. *Dare* (8); *Thompson* v. *Cartwright* (9); *Perry* v. *Holl* (10).

FRY, J., after stating the facts of the case, and the evidence as to the employment of *Riches* by *Woodman* as his solicitor in the preparation of the mortgage of the 24th of May, 1875, and coming to the conclusion on the pleadings and the evidence that *Riches* was the solicitor of *Woodman* in that particular business, continued:— Judgment.

I hold, therefore, as a matter of fact, that *Riches* was the solicitor of *Woodman* in the matter of the mortgage of May, 1875.

The question which then arises is this. Looking at the circumstances of the case, must I impute to *Woodman* the knowledge which *Riches* of course had of the prior charges of September, 1870, and February, 1874? Now, upon that the cases seem to me to lay down the rule clearly. You must, in the first place, look at what are the circumstances of the case as to knowledge. If the circumstances of the case are such as in the ordinary course of business

(1) 19 Ves. 435.
(2) 3 My. & K. 699.
(3) Law Rep. 20 Eq. 238.
(4) Ibid. 6 Ch. 678.
(5) 8 D. M. & G. 454.
(6) 9 Hare, 449.
(7) 3 De G. & J. 547.
(8) 20 Beav. 284.
(9) 2 D. J. & S. 10.
(10) 2 D. F. & J. 38.

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between solicitor and client they are, then the solicitor must be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord *Chelmsford* in *Espin* v. *Pemberton* (1), the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve* v. *Le Neve* (2). If it could be rebutted, the language of Lord *Hatherley* in *Rolland* v. *Hart* (3) could not be upheld. His Lordship says: "The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance, because he was not told of it by his solicitor. It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain." Therefore, what I have to do is to look at the circumstances in order to see whether the presumption or imputation of knowledge arises.

Now, what are the circumstances? In the first place, *Riches* was the solicitor for *Bradley*, and owed *Bradley* this duty, either to register the mortgages of 1870 and 1874, or to tell any subsequent client of his own about to advance money upon the same property that those mortgages existed. In the next place, he was solicitor for *Woodman* in the matter of the mortgage of 1875, and he was bound by his duty as solicitor to communicate anything and everything that was material for *Woodman* to know. It is said that *Riches* had an interest not to communicate, because it is possible that the transaction might have gone off, and he then would not have obtained the benefit which he did by that mortgage. But I will not lay down as a rule that where a solicitor owes a duty on the one side, and has an interest on the other side, the presumption arises that he follows his interest and not his duty. I shall, on the contrary, presume that in this case he performed his duty, even although it was against his interest. But I think that if the

(1) 3 De G. & J. 547. (2) 3 Atk. 646.
(3) Law Rep. 6 Ch. 678, 682.

special circumstances of this case are looked at, the suggestion that the transaction would have failed if that intimation had been given does not arise; because it is perfectly plain that the mortgage of May, 1875, was taken as a *tabula in naufragio*. *Riches* being pressed by *Woodman* to furnish the accounts, and to pay the sums which were then due, was unable to do so, and thereupon the best security to be got was taken from him. Therefore, even supposing the presumption to be stronger than it is, I should not allow it to prevail in this case. But I desire to put my decision mainly upon his, that where there is an interest and a duty, I shall not presume that the solicitor will follow his interest and neglect his duty.

The result, therefore, is, that in my judgment there is nothing whatever to take the case out of the ordinary case of a solicitor being employed by a mortgagee to obtain a mortgage. Where he is so employed, the knowledge of the solicitor is the imputed knowledge of the client. Here the solicitor knew of the mortgages of 1870 and 1874, and therefore I impute that knowledge to the client. It appears to me that it is the case of *Le Neve* v. *Le Neve* (1) over again.

I therefore hold that the mortgage of 1875 must be postponed to the mortgages of 1870 and 1874.

Solicitors for Plaintiff: *Layton, Son, & Lendon.*

Solicitors for *Union Bank: Burton, Yeates, & Hart.*

Solicitors for *Woodman: Wood, Latham, & Bigg,* agents for *Awdry & Clarke, Chippenham.*

(1) 3 Atk. 646.

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[1876 P. 47.]

Stockbroker—Solicitor—Payment—Notice—Stock Exchange Rules.

Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker whom the solicitor had employed in stock exchange speculations directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase-money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker :—

Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance.

Bridges v. *Garrett* (1) commented on.

The sale was made subject to the rules of the *Stock Exchange*, and the stockbroker alleged that by those rules the broker could recognise only the person employing him, and obey his directions as to the disposal of the proceeds of a sale :—

Held, that the rules of the *Stock Exchange* applied only to the sale on the *Stock Exchange*, and not to subsequent transactions.

Held, also, that no such rule or custom was proved, and that no such rule or custom could be upheld.

Statement.

ELIZA ANN PEARSON (then *Eliza Ann Williams*), *E. B. Stephens*, and *C. Hill*, as executors of *J. F. Williams*, held £3700 *Midland Railway Company* stock and 111 preference shares in the same company, all in their names as such executors, in the books of the company.

The executors employed *William Smith*, a solicitor practising as *Smith & Co.* (either alone or in partnership with one *Carter*), in the business of the executorship, and in June, 1875, the Plaintiffs, that is to say, the three executors and *C. F. Pearson*, who, on the 17th of June, 1875, was married to *Eliza Ann Williams*, requested

(1) Law Rep. 5 C. P. 451.

Smith & Co. to have the *Midland* stock and shares sold; and *Smith*, in the name of *Smith & Co.*, gave instructions to a stock-broker, *G. W. Scott*, to sell them. *Smith* had been in the habit of employing *Scott* in speculations on the *Stock Exchange*, and there were accounts and bi-monthly settlements between them; but the accounts in respect of these transactions seemed to have been kept in the name of *William Smith*, and not of *Smith & Co.* The stock and shares were sold on the 24th of June to one *Jackson*, and *Scott* sent to *Smith* the usual sold note stating that the sale was on account of *Smith & Co.*, and was subject to the rules of the *Stock Exchange*. *Scott* at the same time sent seven blank transfers and a letter stating that if the transfers were returned correctly signed the cheque would be forthcoming on Monday next. At this time *Smith* was under considerable liabilities to *Scott* on account of differences which were or might become payable. The Plaintiffs duly signed the seven transfers, and also indorsed receipts for the purchase-moneys, and *Smith* on the 28th of June sent them to *Scott* with a letter saying: "We have made the transfers in the name of Mr. *Pearson* as well as Mrs. *Pearson*, because the secretary of the *Midland Railway Company*, in a letter we received from him, states that if the stock was sold he would require her husband to join in the transfer. The coupons of the £3700 consolidated stock are in the hands of the secretary, as will be seen by the accompanying letter, in which you will observe he states that he will send them in the course of this week, so that if the certificates are sent down to him he will probably make them out now in the names of the purchasers of the stock direct."

On the 30th of June, *Scott* sent to *Smith* an account headed "Messrs. *W. Smith & Co.*, in account with *G. W. Scott*," debiting himself with the net produce of the sales, amounting to £6832 15*s.*, after deducting commission and certain calls paid on the shares, and taking credit for a cheque for £3500 and for two sums amounting to £3332 15*s.* placed in the account "To credit of *W. Smith*." The cheque for £3500 was on that day or the day before given to *Carter* on account of *Smith & Co.*, and sums amounting to £3332 15*s.* were carried by *Scott* in his accounts to the credit of *Smith*. *Smith* went abroad in August, 1875, ostensibly on business but cheques passed between him, or *Carter* in his name, and *Scott*;

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and *Scott* carried on the account between them until the end of 1875, when it was settled and adjusted by the payment of £400 to *Scott*, and a new account was begun. Early in January, 1876, it was ascertained that *Smith* had absconded, and he had since been adjudicated bankrupt.

C. F. Pearson, Eliza Ann Pearson, Stephens, and *Hill* then brought an action against *Scott* for the produce of the sales, offering, in the statement of claim, to allow what had been paid in cash to *Smith* or for calls, claiming, in fact, the balance of £3332 15*s.* which had been carried to the credit of *Smith*.

Scott, by his statement of defence, pleaded that he did not know, and had no reason to believe, that the stock and shares were the property of the Plaintiffs, or that *Smith* was their agent and was not the principal; and pleaded that he had paid the whole of the purchase-money to *Smith*. Also that the whole of the transactions were subject to the rules and customs of the *Stock Exchange*, according to which a broker is bound only to recognise the person employing him, and to obey the direction of that person only as to the application and disposal of the proceeds of sale. The result of the evidence on this point is stated in the judgment of Mr. Justice *Fry*.

Argument.

Cookson, Q.C., and *Blackmore*, for the Plaintiffs, cited *Baring* v. *Corrie* (1).

North, Q.C., and *Methold*, for the Defendant:—

In *Baring* v. *Corrie* there was notice of agency; here there was none. *Borries* v. *Imperial Ottoman Bank* (2) shews what is the law as to means of knowledge. Actual knowledge is one thing, but a mere suspicion is quite different: *Ex parte Dixon* (3). The stockbroker dealt only with *Smith*, and there was nothing to shew that he was not the absolute owner. But even if *Scott* knew that *Smith* was acting as solicitor for the Plaintiffs, he was obliged to do as *Smith* directed, and *Smith* had a clear authority to receive payment: *Bridges* v. *Garrett* (4). Payment by giving credit in their account was quite sufficient: *Ferrao's Case* (5); *Spargo's*

(1) 2 B. & A. 137.
(2) Law Rep. 9 C. P. 38.
(3) 4 Ch. D. 133.
(4) Law Rep. 5 C. P. 451.
(5) Law Rep. 9 Ch. 355.

Case (1). If cheques had been exchanged, that would have been quite good, and what difference can it make that they did not go through that form. Whatever can be pleaded as payment is good payment to an agent: *Tomkins* v. *Saffery* (2); *Ex parte Cooke* (3). The Plaintiffs ought not to have left their accounts with *Smith & Co.* unsettled for so long and then come upon the Defendant. But, independently of the general law, the transaction was under the rules and customs of the *Stock Exchange*, and according to them the broker could recognise as his principal only the man who employed him, and was bound to deal with the money as he directed: *Sweeting* v. *Pearce* (4); *Nickalls* v. *Merry* (5).

Cookson, in reply:—

As to payment to an agent, cases like *Spargo's Case* have no application to the general law. For valid payment to an agent a mere arrangement between the debtor and the agent will not do. If *A.* owes money to *B.*, an arrangement between *A.* and *B.'s* agent that the money shall be considered as paid can never discharge *A.*, and would not support a plea of payment; nor is it true that every form of payment which would support a plea of payment to an agent will discharge the debtor. The debtor must shew that he had reason to believe that the money would reach the principal, and it is clear that in this case the Defendant could not have thought so. The only reason why payment in cash or bills has been held good is, that there is a presumption that the agent will do his duty and hand the cash or bills to his principal.

FRY, J.:—

In this case the Plaintiffs are the executors of Mr. *John Fisher Williams*, and they sue the Defendant, who is a stockbroker, for the recovery of the balance of a sum of money received by him for the sale of certain stock and preference shares of the *Midland Railway Company*. It would be convenient, I think, before stating in detail the facts as they appear to me to be proved, to state the principal questions which arise.

(1) Law Rep. 8 Ch. 407.
(2) 3 App. Cas. 213.
(3) 4 Ch. D. 123.
(4) 9 C. B. (N.S.) 534.
(5) Law Rep. 7 H. L. 530.

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The first question is, whether the Defendant had knowledge that the Plaintiffs were the owners of the stock and shares in question, or had such notice as put him on inquiry whether they were the owners of the stock and shares so as to preclude him from saying that they were not the owners. The second question will be whether, assuming that he had knowledge of the interest of the Plaintiffs, a Mr. *Smith* was so constituted the agent of the Plaintiffs to receive the money from Mr. *Scott*, that the transaction on settlement which took place between Mr. *Scott* and Mr. *Smith* was a payment through their agent to the Plaintiffs. Those are the principal questions.

Now with regard to the first question it will be necessary to consider the facts of the case. [His Lordship then stated the facts of the case, observing that the circumstance that the cheque was to be "forthcoming on Monday next" appeared to him to be not unimportant, as separating this transaction from the ordinary transactions for differences which at that very time *Smith* was carrying on to a large extent. For, notwithstanding the possibility or the probability that *Smith* might owe *Scott* on the settlement a considerable sum for differences, this transaction was to be completed separately. It had been suggested on the part of the Plaintiffs that this was due to the knowledge that the stocks and shares did not belong to *Smith*, but belonged to his clients. It had been suggested, on the other hand, that the cheque was to be forthcoming, because there was no reason why Mr. *Scott* should retain the moneys in order to pay for the future purchase of shares. It was not necessary to determine which of these two contingencies was the more probable. It was enough to say that, as it appeared to his Lordship, the transaction was by the common consent of both parties taken out of the ordinary course of dealing between them. Further, it appeared clear that, on the receipt of that letter of the 28th of June, and the transfers, *Scott* must have known that the Plaintiffs had an interest of some description in these shares. They were the legal owners, and appeared as the proper persons to execute the transfers. The reference in the letter to the coupons would, in his Lordship's opinion, shew that the Plaintiffs were persons who were deriving title from somebody else. But whether that was so or not, nobody could read that letter and

look at the transfers without seeing that the Plaintiffs were then the registered proprietors, and at law the owners of these stocks and shares. There was certainly notice to this extent, that it put *Scott* on inquiry whether they were not the absolute owners. His Lordship then continued:—]

A person who knows that the legal estate in land or in shares, or in any other property, is vested in *A. B.*, cannot safely assume that the whole equity is in *C. D.* without making an inquiry of *A. B.* The case of *Baring* v. *Corrie* (1) bears strongly on this question. There *Coles & Co.* acted both as brokers and merchants, and *Abbott*, C.J., said that if the Defendants "meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case if they had not chosen to remain in ignorance. There is therefore a clear omission on their part, and they do not stand in a situation so completely free from blame as the Plaintiffs do. There is another circumstance which shews that if they did not know that *Coles & Co.* were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note." Now it appears to me that similar circumstances exist here. *Smith* was known to be a person who speculated in shares on his own account; he was known, also, to be a solicitor, that is to say, a person through whom instructions to sell the stock and shares in the names of these four persons might be given, either because he was the solicitor of the owners, or because he was the equitable owner, and if the Defendant chose to assume that *Smith* gave those instructions in the character of equitable owner, he ought to have made some inquiry if he wished to avoid liability. That being so, I hold that the shares having been in fact the property of the Plaintiffs, and the Defendant not having made inquiry, he cannot be heard to say that he dealt with *Smith* in any other character than as agent of the Plaintiffs.

Then, what was the extent of *Smith's* agency for the Plaintiffs?

(1) 2 B. & A. 137, 144.

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It appears from the letter of the 28th of June that the transfers were sent by *Smith & Co.* to *Scott* on that day, and that the receipts on those transfers were signed by the Plaintiffs. That would, in my judgment, import an authority in the person who was allowed to transmit these receipts himself to receive the money as money. The Plaintiffs, in the statement of claim, say that as to such part as was paid in cash or in discharge of a call properly payable by the Plaintiffs, they are willing to accept such payments as payments made to themselves or on their account. That appears to be a distinct admission that *Smith & Co.* were armed with authority from the Plaintiffs to receive the purchase-money by an actual payment in cash, but no further. [His Lordship then stated the transactions of the 30th of June, and the result of the account then delivered, and continued:—] Now, supposing that *Smith* had been the person absolutely entitled to the balances produced by the sale of the stock and the shares, there can, in my opinion, be no doubt that the transaction which then took place would have amounted, not to what is technically called set-off, but to a payment by *Scott* to *Smith* of so much of those sums as went to satisfy any debt due from *Smith* to *Scott*, and that the same would have taken place when subsequent differences accrued, and, therefore, in the result, when the differences were payable, the whole £3332 15*s.*, which on the 30th of June *Scott* owed to *Smith*, would have been deemed to have been paid by *Scott* to *Smith*.

But that gives rise to another question. Where *A.* owes money to *C.* and has dealings with *B.*, who is an agent to collect money for *C.*, it is not in dispute that *A.* must make actual payment in money to *B.* It is not suggested that *A.* can discharge himself by that which is technically a set-off, that is to say, a retainer, without the consent of the person against whom it is retained. It is not alleged that he can accept a release from the agent to whom he ought to pay it. But it is said that anything which will amount to payment in law as between the principal and the agent is a good payment to the agent. That, however, appears to me to be a mixed question of fact and law. In the first place, the question must be asked, what was the authority of the agent? In this case I can find no authority going beyond an authority to

receive in money. In the next place, it appears to me that a long series of cases has in effect laid down the proposition that the payer who knows he is paying an agent must pay in such a manner as to facilitate and encourage the agent to pay it to his principal—at any rate, that the payer cannot pay it to the agent by a settlement of account between himself and the agent. And for this short reason in morals, that the money which is paid to the agent ought to find its way to the principal, and that if you intercept that money in order to pay the debt which the agent owes to the payer, you diminish the probability of the money finding its way from the agent to the ultimate payee.

In consequence, however, of the recent decisions, it appears to me necessary to look at the cases. In *Todd* v. *Reid* (1) the judgment is that "The broker, as agent of the assured, was only entitled to receive payment in money, and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another."

In *Bartlett* v. *Pentland* (2), an assured, who resided at *Plymouth* employed an insurance broker in *London* to recover a loss from the underwriters, and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums; and it appears to me that the transaction between the parties was one which might have been pleaded by way of payment. It was not set off, because it was the extinction of two debts by mutual agreement of the parties, which is payment, and therefore that case gave rise to a suggestion whether payment in that manner is payment to satisfy the obligation of the payer. And Lord *Tenterden* says: "An authority given by a principal to his agent to receive money cannot be construed into an authority not to receive money, but to allow the debtor to write off so much as may be due from the agent to him." That appears to me a distinct decision that it is not every mode of payment which will be good, but that the mode of payment must be one following the authority; and if the authority is to receive money in payment, then that which would be pleadable as payment, but is not in fact payment in money, will not be enough. Mr. Justice *Bayley* puts

(1) 4 B. & A. 210, 211. (2) 10 B. & C. 760, 769.

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it even more plainly (1): "If instead of making the payment in that way"—that was, by payment to the order of the principal—"they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money; then, as the broker was not authorized to receive payment in that way, it was done at the peril of the underwriters." Again he says: "As the company did not put *Mitchell* in the possession of money so as to give him an opportunity of transmitting that money to the principals, but merely wiped off a debt of their own, and paid, not by money, but by set-off"—that does not mean strictly legal set-off—"they did that which was not authorized by the Plaintiffs." Mr. Justice *Littledale* puts it in this way (2), which is not unimportant: "The only question, therefore, is whether *Mitchell* had authority from the Plaintiffs to settle the account with the underwriters in the way in which he has done. There certainly was no express authority given by the Plaintiffs to *Mitchell* so to do, but that authority might be implied if there had been any course of dealing between the Plaintiffs and the present underwriters and *Mitchell* in which losses had been set off in this manner against a debt due from the broker to the underwriters." In the present case it is clear that no express authority had been given to receive by way of set-off, and there is no suggestion that the course of dealing between the Plaintiffs and *Smith* had resulted in that.

The case of *Barker* v. *Greenwood* (3) is not entirely unimportant, as shewing that the law is well ascertained on this point. There Baron *Alderson* says: "An agent with a general authority like this is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this his duty."

The case of *Scott* v. *Irving* (4) enforces the same general principle; and I only refer to it in order to say that a new expression seems to have been introduced into that case by Mr. Justice *Parke*,

(1) 10 B. & C. 771, 772.
(2) Ibid. 774.
(3) 2 Y. & C. Ex. 414, 419.
(4) 1 B. & Ad. 605, 614.

who said: "*Mitchell*, therefore, was the agent of the assured to receive payment from the underwriter in cash, or that which was equivalent to payment in cash."

In *Sweeting* v. *Pearce* (1) Mr. Justice *Byles* puts the principle of this class of cases with great clearness. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent as a general rule cannot receive payment in anything else but cash." Now that, it will be observed, is the precise point here, because the payment alleged is payment by settlement of accounts between the agent and the debtor. Mr. Justice *Willes* puts the same view in shorter language: "As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent." That case went to the Exchequer Chamber (2), and was determined in the same way by that Court.

The next case is *Bridges* v. *Garrett* (3), which has caused me very considerable anxiety lest I should not give due weight to the decision arrived at. There the Plaintiff was as lord of the manor entitled to receive a fine, and the fine was paid to the deputy steward by a cheque drawn by the surrenderee on the surrenderor's bankers, crossed with the bankers of the deputy steward, and paid by the deputy steward into his own bank, to whom he owed money, and therefore, in effect, the surrenderee paid the debt to the lord by requesting a debtor to him to pay to a person to whom the deputy steward owed money a sum in diminution of the deputy steward's debt, that is what it comes to. It was held by the Court of Common Pleas that that was not a good payment, on the general principle which I have referred to. It was held by

(1) 7 C. B. (N.S.) 449, 485. (2) 9 C. B. (N.S.) 534.
(3) Law Rep. 4 C. P. 580.

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the Court of Exchequer Chamber (1), that it was a good payment. In that case the jury had found as a matter of fact that *Craig*, the deputy steward, had authority to receive the fine for the lord, and that a crossed cheque was a good payment to the lord within the authority to pay to *Craig*. They found, therefore, that the payment was actually within the authority, and the short effect of the decision of the Court of Exchequer Chamber is, that they thought there was evidence for the jury, and refused to disturb their finding. They thought, moreover, that, seeing that the cheque given by the surrenderee was good, and that it was an ordinary course of business to make payments by cheque, it might be considered that that cheque so given, when cashed, became a payment of cash to the agent. It appears therefore to me that, in their opinion, that case came within the rule, and that the fact, which probably was unknown to all the parties at the time, that the deputy steward owed money to his bankers, was immaterial, and that the transaction therefore none the less remained a payment in cash. If I had considered that that case was intended to overrule the long current of decisions to which I have referred, I should have entirely yielded to it, but it appears to me that the Court did not intend to do anything of the sort, and considered their decision consistent with the previous decisions.

I think, therefore, that the law still stands, as it certainly stood before that case, that a person who owes money to an agent, knowing him to be an agent, must pay in such a manner as to facilitate the agent in transmitting the money to his principal, and that the payer cannot pay that agent by a settlement of account in which the payer himself gets the benefit of the payment, as took place in this case. I therefore conclude that according to the common law the payment was not good.

But then it is said that, if that be so, the payment was nevertheless good in this case, because of a certain custom or rule of the *Stock Exchange*. Now, in the first place, I must inquire how far that custom would apply to the present case. It is quite true that the Defendant has sworn that the whole of the transaction was made subject to the laws, rules, and customs of the *London Stock Exchange*, and it is quite true that his clerk has

(1) Law Rep. 5 C. P. 451.

echoed the same language. But I cannot take statements of that sort as going beyond the written instrument which I find before me, and what I find is, that the sale was made subject to the rules of the *Stock Exchange*. Therefore, undoubtedly, *Scott* would perform his duty and *Smith* would perform his duty if the contract was carried into effect as between vendor and purchaser according to the rules of the *Stock Exchange*, and those rules would govern the performance of the contract. But the question I have to consider is not one between the parties dealing on the *Stock Exchange*, but one between *Scott* after the transaction was completed on the *Stock Exchange*, and the principal who gave him authority to buy, and the persons who instructed that principal. I hold it not necessary for the performance of that contract that the mode of payment by the broker should be subject to the rules of the *Stock Exchange*.

The next inquiry is, what is the rule or custom so set up? *Scott* appeared to think that such a rule as that you may in effect set off the debt due to the agent as agent against a debt due from the agent in his personal character is to be found in the printed book. It is not now contended that any such rule is to be found in the printed book, but then there is the evidence of Mr. *P. Smith*, who says that, "according to the customs of the *London Stock Exchange*, a broker is bound only to recognise the person actually employing and instructing him to sell or purchase stocks or shares, and to obey the directions of that person only as to the mode of payment and as to the application and disposal of the proceeds of sale, and it is the invariable custom for the broker to recognise only the instructions and directions of such person actually employing him,—that person is alone his principal." Then he says that the broker acts on that custom; and he winds up by saying, "The broker thus, as to his receipts and payments for such principal, acts in the same way as a *London* banker would act for his customer." Now observe what the custom set up is. It is that the broker, knowing the money which he owes to *A.* to be really the money of *B.*, may stop that money in order to pay a debt due to himself, the broker, from *A.* personally—in other words, it is a custom to pay one man's debt out of another man's money. In the first place, I do not think such a custom could possibly be

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upheld as reasonable, and I think the cases of *Scott* v. *Irving* (1), *Sweeting* v. *Pearce* (2), *Ex parte Cooke* (3), and *Tomkins* v. *Saffery* (4), all tend to shew that that custom could not be upheld. I will refer to one passage, and one passage only, in the judgment of the Exchequer Chamber in the case of *Sweeting* v. *Pearce*, where Mr. Justice *Crompton* said: "It seems to me that the usage contended for here, which permits the underwriter to set off the loss in account with the broker and so to discharge himself from the claim of the principal, though the latter is ignorant of the custom, is unreasonable." Here, too, there is no attempt to shew that the Plaintiffs had any knowledge of this alleged custom, and I hold that in the absence of such knowledge such a custom is unreasonable. Further than that, this observation must be made. The witness *Smith* says that the broker is exactly in the same position in his dealings with his principal as a *London* banker would be in his dealings with his customer. But the cases of *Pennell* v. *Hurley* (5) and *Bodenham* v. *Hoskyns* (6) have shewn that a *London* banker has no such right as it is here said the broker has. In *Pennell* v. *Hurley* the Vice-Chancellor *Knight Bruce* puts the case with that brevity and clearness which is usual to him. It was a case in which a banker sought to apply money belonging to *A.*, as trustee, to pay the debt of *A.* due from himself personally to the banker. His Honour said this "Money is due from *A.* to *B.* in trust for *C.* *B.* is indebted to *A.* on his own account. *A.*, with knowledge of the trust, concurs with *B.* in setting one debt against the other, which is done without *C.'s* consent. Can it be a question in equity whether such a transaction can stand? There is nothing more in the case than that." The banker, therefore, has not the right which *Scott* seems to think he has, and the witness *Smith* saying that the right of a broker is equivalent to that of a banker, it follows that the broker has no such right as is here set up. That, therefore, can make no difference in the case.

One other point remains for consideration. It is said in this case that I ought not to give immediate judgment for the whole

(1) 1 B. & Ad. 605.
(2) 9 C. B. (N.S.) 534.
(3) 4 Ch. D. 123.
(4) 3 App. Cas. 213.
(5) 2 Coll. 241.
(6) 2 D. M. & G. 903.

£3332 15s. which *Scott* attempted to settle in account with *Smith*, and for this reason, that there were other cheques subsequently paid by *Scott* to *Smith*, and that there were undoubtedly payments by *Smith* to the Plaintiffs. But it appears to me, on the evidence, that the Plaintiffs have distinctly shewn that no part of the £3332 15s. ever reached their hands from *Smith*. They might have been cross-examined on it. They have not been. In fact, what they say is this: "We never have received the £3500 for which we have given credit, still less have we received any portion of the £3332 15s." I think that circumstance in itself would preclude the Defendant from requiring an account to be taken between *Smith* and the Plaintiffs. But further than that, it appears, as far as the accounts are in evidence before me, that there was no distinct payment made by *Scott* to *Smith* for the purpose of payment to the Plaintiffs, and I think, according to the case of *Bartlett* v. *Pentland* (1), and the decision there given with regard to a particular sum of £200, it would be necessary for the payments to have been so made in order for *Scott* to avail himself of them as payments to *Smith*, having regard to the settlement come to in June. I think, therefore, there must be an immediate judgment for the whole amount of 3332 15s., which was attempted to be dealt with by the settlement on the 30th of June.

I must of course give the Plaintiffs the costs of the action.

Solicitors for Plaintiffs: *Cowdell, Grundy, & Browne.*
Solicitor for Defendant: *F. Rolt.*

(1) 10 B. & C. 760.

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May 15.

WADDELL *v.* TOLEMAN.

[1877 W. 369.]

Bankruptcy—Equitable Mortgage—Foreclosure—Jurisdiction.

11 Ch D 282

The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the Court of Bankruptcy.

Statement.

J. T. TAYLOR in 1867 borrowed £1000 from *C. Gwilt* on the security of a deposit of the title-deeds of lands in *Surrey*, with a memorandum of deposit and an agreement to execute a mortgage. In 1869 *Taylor* made an assignment for the benefit of his creditors to the Defendant, *J. Toleman*, and to *S. Taylor* (since deceased). In 1872 *Gwilt* assigned his security to *W. Smith*. In 1876 *Smith* was adjudicated bankrupt, and the Plaintiff, *J. Waddell*, was appointed trustee in the bankruptcy.

The Plaintiff, as trustee in the bankruptcy of *Smith*, brought this action against the Defendant as trustee of the mortgagor's creditors' deed, claiming foreclosure.

Argument.

Northmore Lawrence, for the Plaintiff, as to the right to bring an action instead of applying to the Court of Bankruptcy, cited *White* v. *Simmons* (1); *Ex parte Pannell* (2).

G. W. Lawrance, for the Defendant, objected that, as Plaintiff and Defendant were both bankrupts, the Plaintiff ought to have applied to the Court of Bankruptcy and got an order for the sale of his security. The Court of Bankruptcy would have both parties before it, and could go into the accounts between them. In the cases cited, only the mortgagor was bankrupt.

Judgment.

FRY, J.:—

The question I have to decide is on a very short point. *Taylor* made a mortgage by deposit of deeds with one *Gwilt*. *Taylor* in 1869 executed a creditors' deed of which the Defendant was the

(1) Law Rep. 6 Ch. 555. (2) 6 Ch. D. 335.

trustee, and *Gwilt* in 1872 assigned his security to *Smith*. *Smith* in 1876 became bankrupt, and the trustee in that bankruptcy now comes here and asks for foreclosure. It is not denied that an ordinary mortgagee would be entitled to foreclosure notwithstanding the bankruptcy of the mortgagor, but it has been said that because the Plaintiff is also a trustee in bankruptcy he is not entitled to foreclosure, but must apply to the Court of Bankruptcy. That, in my opinion, is not the law of this country; the trustee in such a case has an alternative right, and if he chooses to apply to this Court for foreclosure he can have it.

I give judgment for foreclosure in the usual form.

Solicitor for Plaintiff: *Benn Davis.*
Solicitors for Defendant: *Lawrance, Plews, & Baker.*

GARLAND *v.* BEVERLEY.

[1876 G. 187.]

Will—Name—Misdescription—Eldest Son—Heir-at-Law—Gavelkind Heirs.

A testator devised lands to *William*, the eldest son of the testator's nephew. The nephew had two sons, *John*, the elder, and *William*, the younger:—

Held, that the devise was to *William*.

A testator made devises of gavelkind lands for lives and in tail, with remainder to his right heirs:—

Held, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs.

Statement.

EDWARD GARLAND, by his will, dated the 12th of August, 1840, gave, devised, and bequeathed all that his freehold estate wherein he then lived at *Southfleet*, in the county of *Kent*, and all other his lands, tenements, hereditaments, and real estate whatsoever and wheresoever, unto and to the use of *Z. Piggott* and *J. Matthews*, and their heirs, upon trust to permit the testator's nephew *John Garland* to occupy the same and take the rents thereof during his life, and after his decease "Upon trust to permit and suffer *William Garland*, the eldest son of my said nephew *John Garland*, to use and occupy and enjoy the same,

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and to receive and take the rents, issues, and profits thereof in like manner for and during the term of his natural life, without impeachment of waste (except as aforesaid), and from and immediately after his decease, upon trust to hold the same unto and for the use of the first son of the body of the said *William Garland* lawfully to be begotten, and the heirs of his body lawfully issuing; and in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *William Garland* lawfully to be begotten severally, successively, and in remainder one after another, as they and every of them shall be in priority of birth;" and in default of such issue, then unto the right heirs of the testator for ever.

The testator died in 1840. He had a nephew *John Garland*, the son of his eldest brother who was dead. *John Garland* the nephew had had four sons, of whom the two eldest were dead; and there were living at the date of the will and of the testator's death *John Garland* the nephew, and two sons of his, namely, *John Garland* the great-nephew, aged about ten years, and *William Garland*, aged about eight years. The only land belonging to the testator was a farm at *Southfleet*, which was of gavelkind tenure.

John Garland the nephew died in 1876, and actions were then brought for the administration of the testator's estate, in which two questions were raised on the construction of the will. First, whether the testator by "*William Garland*, the eldest son of my said nephew *John Garland*," meant *John Garland* the great-nephew, who was then the eldest son, or the other son, *William Garland?* And, secondly, whether, if the devise was to *William Garland*, the land went on the failure of heirs of his body to the heir-at-law, or to the gavelkind heirs of the testator?

On the first question,

Argument.

North, Q.C., and *Townsend*, for some of the gavelkind heirs of the testator, contended that the testator meant *William Garland*. The testator has given the name of an existing person, and in order to displace him, clear proof must be given that he was not meant. *Veritas nominis tollit errorem demonstrationis: Broome's* Leg. Max. (1) But here there is no error, the name is repeated

(1) Page 637.

three times, and the testator must be supposed to have known the names of his nephews: *Doe* v. *Huthwaite* (1); *In re Feltham's Trusts* (2). As to the effect of evidence in such cases to shew who was meant: *Bradshaw* v. *Bradshaw* (3); *Newbolt* v. *Pryce* (4); *Doe* v. *Hiscocks* (5); *Doe* v. *Rouse* (6); *Camoys* v. *Blundell* (7). The cases of *Adams* v. *Jones* (8) and *Bernasconi* v. *Atkinson* (9) are strongly in our favour. Other authorities are, *Garner* v. *Garner* (10); *Gillett* v. *Gane* (11); *Farrer* v. *St. Catherine's College, Cambridge* (12); *Grant* v. *Grant* (13). There is no rigid rule, and the Court has merely to find whom the testator meant. There is no evidence to shew that the testator did not mean the great-nephew whom he has named. The name is right, and he has merely added an erroneous description. In *Charter* v. *Charter* (14) the name was not given at all.

Kekewich, Q.C., and *F. G. Bagshawe*, for Defendants in the same interest:—

The testator has simply selected one of his great-nephews, and has devised the farm to him: *Goodwyn* v. *Goodwyn* (15).

Ingle Joyce, for *John Garland* the great-nephew, eldest son of *John Garland* the nephew:—

The testator's great-nephews were children, and he was very likely not to know their names. The whole disposition of this will is to settle the property on the eldest family, and he clearly meant his eldest great-nephew, but made a mistake in the name. *In re Feltham's Trusts; In re Nunn's Trusts* (16); *Drake* v. *Drake* (17) shew that the description has generally prevailed over the name. *Hodgson* v. *Clarke* (18).

(1) 8 Taunt. 306; 2 Moo. 304; 3 B. & A. 632.
(2) 1 K. & J. 528.
(3) 2 Y. & C. Ex. 72.
(4) 14 Sim. 354.
(5) 5 M. & W. 363.
(6) 5 C. B. 422.
(7) 1 H. L. C. 778.
(8) 9 Hare, 485.
(9) 10 Hare, 345.
(10) 29 Beav. 114.
(11) Law Rep. 10 Eq. 29.
(12) Ibid. 16 Eq. 19.
(13) Ibid. 5 C. P. 727.
(14) Ibid. 7 H. L. 364.
(15) 1 Ves. Sen. 226.
(16) Law Rep. 19 Eq. 331.
(17) 8 H. L. C. 172.
(18) 1 D. F. & J. 394.

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GARLAND v. BEVERLEY.

Judgment.

Speed, for the trustees.

North, in reply.

FRY, J., read the clause of the will, and stated the facts of the case, and continued:—

It is therefore apparent that there was no such person as "*William Garland*, the eldest son of my said nephew *John Garland*." There was a *William Garland*, who was the youngest son of the testator's nephew *John Garland*, and there was a *John Garland*, who was the eldest living son of the testator's nephew *John Garland*. I have, therefore, before me the case of a devise in which the object of the devise is described in language which in its entirety fits no existing person. In that state of circumstances the question which I have to answer is this, In which portion of the language by which the object of the testator's bounty is described must I assume the greatest intensity of force or meaning to reside? In which is it most likely that the testator was careful and exact? In which is it most likely that he was careless or inexact? In which part of the entire description is there the greater, and in which is there the lesser, probability of error?

Now, I will refer to the language in which the question is stated by the Vice-Chancellor Sir *W. P. Wood*, afterwards Lord Chancellor, in the case of *Bernasconi* v. *Atkinson* (1): "The principle of the cases is, that where there are two descriptions—where the testator specifies in two different ways the object of his bounty, the Court adopts that which, in each instance, appears to be the least open to error." Now, which in this case is the least open to error: the name "*William*," or the description of "eldest son"? I think there is the least probability of error in the name "*William*," and for this reason, that a man's name is a thing by which he is usually called, and when you want to speak of the man you usually are exact in his name, although you may be inexact in the description you give either of his parentage or of his residence, or of the other incidents or accidents which attach to him. That appears to me to be commonly though not necessarily the case. It has been urged that in this case the description "eldest son" is

(1) 10 Hare, 345, 352.

more probably right than the name "*William*," and for this reason. It is said that the name "*William*" expresses no reason for the devise, but the description of eldest son carries with it the motive which induced the testator to make him the object of his bounty. The will must undoubtedly be looked at to ascertain whether that is or is not the case.

Now, the argument of Mr. *Ingle Joyce* on that part of the case is this. He has said that the testator recognises the principle of primogeniture which is so familiar in the dispositions of landed property in this country, that he gives the property in the first place to the sole son of his eldest brother, recognising, therefore, the eldest branch; and, having given it to him for life, it was probable that he would give it to his eldest son in succession. No doubt that is very probable, but it is not like the case of a father settling his own property in strict settlement upon his own descendants, and it is simply the case of a testator providing a life interest for a nephew, and desiring to make some provision for some members of the family of that nephew. Now it is quite possible that the nephew may have had property of his own. It is quite possible that the testator may have expected that his nephew would provide, at any rate, for his eldest son. It is also quite possible that the second son may have been an object of special favour with the testator. It is not the case of a will creating a strict family settlement of property, but excluding the eldest son, under circumstances which rendered it improbable that the eldest son was intended to be excluded. It appears to me, therefore, that there is nothing in the expression "eldest son" which countervails the probability that the name expresses the real will and meaning and intent of the testator.

As confirming the conclusion at which I have arrived, I desire to draw attention to that which is undoubtedly only a *dictum*, but still a *dictum* entitled to weight, of Lord *Brougham* in the case of *Camoys* v. *Blundell* (1): "For instance, take the case of a gift to *A. B.*, the eldest son of *C. D.*, and there exists an *A. B.*, a second son of *C. D.*, to take; there, apparently, the name is right. But *A. B.* is the second son of *C. D.*, and consequently he must take as *A. B.* if he take at all, and he cannot take as the eldest son of

(1) 1 H. L. C. 778, 792.

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C. D., inasmuch as that *demonstratio personæ*, or description, does not apply to him, he being the second son of *C. D.*" Lord *Brougham*, therefore, by way of illustration, gave the particular case which has occurred in this litigation, and he apparently came to the conclusion that the name ought, in that instance, to prevail.

The maxim which finds its expression in Lord *Bacon's* Maxims of the Law (1), as *Veritas nominis tollit errorem demonstrationis*, has been pressed upon me as entitled to great weight in the decision of this case; but it is a maxim from which I feel it exceedingly difficult to derive any light. What are the conditions under which that maxim is to be applied? You must first find the "*veritas nominis*," that is, you must find the true intent of the testator as expressed in the name. In the next place, you must find that there is "*error demonstrationis*," that is to say, you must find that the demonstration or description is inaccurate. But when I have found those two things I want no maxim at all. It appears to me, therefore, that it is like a pilot who comes on board your vessel when you have got into harbour. It gives you guidance when you are safe through the shoals. I have found it, therefore, difficult to derive any light from that maxim, and I observe that the learned Judges and members of the House of Lords have expressed the great difficulty which they found in deriving any light from it. Lord *Bacon*, however, has explained the maxim in a way which, if it is to be followed, does undoubtedly afford some assistance. He says: "There be three degrees of certainty:—1. Presence; 2. Name; 3. Demonstration or Reference. Whereof the presence the law holdeth of the greatest dignity, the name in the second degree; and the demonstration or reference in the lowest, and allows the error or falsity in the less worthy." That is to say, if there be the name and demonstration, and the two cannot fit one and the same object, you are to take the name and neglect the demonstration—you are to presume the error or falsity to be in the demonstration and not in the name. Having applied the rule to land, and to the subject-matter of the gift, he applies it to the object of the gift. He says (2): "The like reason holds in demonstrations of persons that have been declared in demonstration of lands and places, the

(1) Reg. 25, Law Tracts, p. 102.

(2) Page 101.

proper name of everieone is in certaintie worthiest, next are such appellations as are fixed to his person, or at least of continuances, as sonne of such a man, wife of such a husband; or addition of office as clerke of such a Court, &c." This language does appear to assist the argument of the Plaintiffs, but I think it very difficult to give much weight to it when I look at the decisions of the highest tribunal on this point. In the case of *Camoys* v. *Blundell* (1), Lord *Brougham* expressed the difficulties which he found in applying that rule. Still more pointedly, in the case of *Drake* v. *Drake* (2), the Lord Chancellor, Lord *Campbell*, said, "I think that there is no presumption in favour of the name more than of the demonstration." In like manner, in *Bradshaw* v. *Bradshaw* (3), the Chief Baron said, "It has generally been found where mistakes have been assumed to have been made either in the name or description of the devisee, or the property devised, that the mistake has been made in the name and not in the description." The same view was expressed by Lord *Hatherley* when Vice-Chancellor. He says, in *Bernasconi* v. *Atkinson* (4), "It certainly does appear singularly enough that the description of the legatee has in most of the cases referred to prevailed over the name." I advert to this in order to shew that my decision does not rest upon the principle of any presumption or inference of law in favour of the name over the description taken abstractedly. I have neglected that principle, although if I had followed it it might have afforded an additional support to the conclusion at which I have arrived. The ground upon which I have proceeded is simply this. I have inquired of myself, looking at the will and the circumstances of the case, in which is the probability of error the greater, in the name or in the description? I answer that the probability of error is greater in the description than in the name, and therefore hold that the devise was to *William* and not to the eldest son.

Statement.

William Garland was dead unmarried. The devise to him and the heirs of his body had therefore failed and the devise over to

(1) 1 H. L. C. 778.
(2) 8 H. L. C. 172–179.
(3) 2 Y. & C. Ex. 86.
(4) 10 Hare, 352.

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the right heirs of the testator took effect; and the question whether the heir at common law or the gavelkind heirs succeeded under the devise to the right heirs was argued.

Argument.

North, Q.C., and *Townsend*, for some of the gavelkind heirs:—

The only land which the testator had was gavelkind, and he must have meant gavelkind heirs: *Robinson's* Gavelkind (1); *Co. Litt.* (2).

[FRY, J., referred to *Doe* v. *Jones* (3).]

Vin. Ab. Tit. "Heir" (4). The cases of *Thorp* v. *Owen* (5) and *Polley* v. *Polley* (6) are quite distinguishable. The observations of the Vice-Chancellor in *Sladen* v. *Sladen* (7) are strongly in favour of the gavelkind heirs. The words "right heirs" must mean the persons to whom the property would go on the death of the owner intestate. If he had said "my gavelkind heirs" it would have been clear, and does not this amount to the same thing? The Act 3 & 4 Will. 4, c. 106, s. 3, makes no difference. Before that Act heirs would have taken by descent, now they take by purchase, and that is all.

Kekewich, Q.C., and *F. G. Bagshawe*, for the devisees of *John Garland* the nephew, who was the common law heir of the testator, cited *De Beauvoir* v. *De Beauvoir* (8); *Hawkins* on Wills (9); *Theobald* on Wills (10).

Townsend, in reply.

Judgment.

FRY, J., after reading the words of the devise, continued:—

The question is, who takes under that limitation to the right heirs of the testator? In my judgment, the expression "my own right heir," or "right heirs," means, according to the law of *England*, the heir or heirs of the testator at common law. About that, as a general proposition, I imagine no doubt can be entertained. Then, is that meaning altered by the fact that the testator was

(1) New Ed. p. 69.
(2) 10 a.
(3) 2 Dow. & R. 373.
(4) G. 5.
(5) 2 Sm. & Giff. 90.
(6) 31 Beav. 363.
(7) 2 J. & H. 369.
(8) 3 H. L. C. 524, 541.
(9) Page 168.
(10) Page 167.

possessed of gavelkind lands? In my opinion it is not. Is it altered by the fact that he devises gavelkind lands? In my opinion it is not.

It appears to me that this point has in substance been decided a great many years ago. I find that so long ago as the 37th *Henry* VIII. this was decided (*Brooke*, Ab. Done and Remainder (1)), "That if land of gavelkind is leased for life, the remainder to the right heirs of *W. M.*, who has issue four sons and dies, and then the tenant for life dies, the eldest son of *W. M.* shall alone have the land, for he is the right heir, and this is a name of purchase." That has been followed by the high authority of Lord *Coke*, who expresses the rule in this way (*Co. Litt.* (2)): "If lands of the nature of gavelkind be given to *B.* and his heirs, having issue divers sons, all his sons after his decease shall inherit, but if a lease for life be made, the remainder to the right heirs of *B.* and *B.* dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent." And Mr. *Hargrave* in the note to that passage has explained, as it seems to me, with great clearness the right view upon this point. He says, "The reason seems to be that though the subject of the gift is customary land the heir at common law is presumed to be meant unless words are added to describe the customary heir. But if such special words are used the presumption fails, and then it said that though the subject of the gift is common law land, yet the customary heir shall be preferred."

Therefore it appears to me to stand in this way: if I give customary land, gavelkind land, borough English land, personal estate or leasehold estate to my right heirs, the words mean my heir at common law. If I give land in common socage to my heirs in gavelkind, the words mean my heirs in gavelkind.

But, then, it is said that those old authorities are not binding, and for this reason: that in *Co. Litt.* (3) it is laid down that "if *A.* have issue a son and a daughter and a lease for life be made, the remainder to the heirs females of the body of *A.* *A.* dieth; the heir female can take nothing, because she is not heir; for she must be both heir and heir female, which she is not." It is said,

(1) Pl. 42. (2) 10 a. (3) 24 b.

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and said truly, that that principle has been overruled; and it is averred that because that proposition has been overruled the other has gone with it. I am bound to say that I do not see the sequence upon which that argument rests, and I observe that the learned Vice-Chancellor Sir *John Stuart* was equally unable to see it when a similar argument was addressed to him in *Thorp* v. *Owen* (1).

There are several cases since these old authorities, but it so happens, rather curiously, that none of them have raised the precise point. It may be observed with regard to those cases that they fall under two classes. One class is where a mixed property has been given to the heirs or right heirs of the testator, and where one of the ingredients of the mixed property has been socage land; and it is said that that is the reason why the common law heirs take. It seems to me not to be so; for it seems to me the reason is, that the right heir is the common law heir. The other class of cases is where the gift has been, not to the heirs of the testator himself, but to the heirs of some third person, and it is said that that makes a difference. I am at a loss to see why it makes a difference. It appears to me that this point is amply covered by authority, and I hold that the words "right heirs" are words of purchase, and that the person answering that description is the common law heir.

I have attended with that respect with which I shall always attend to any doubt of Lord *Hatherley* or to any expression of his opinion, to the observations in *Sladen* v. *Sladen* (2), and I need hardly say that if Lord *Hatherley* had expressed a decided opinion I should have felt myself bound to follow it; but, observing that he carefully avoided expressing anything like a decided opinion upon the point, it does not appear to me that I should be right in following the expression of doubt which he there gave utterance to in opposition to those old authorities which, in my judgment are clear upon the point.

I may add further, that though the cases of *Polley* v. *Polley* (3) and *Thorp* v. *Owen* may not determine the precise point, yet when looked at to ascertain the principle on which the Judges

(1) 2 Sm. & Giff. 90.
(2) 2 J. & H. 369.
(3) 31 Beav. 363.

proceeded, they seem to me to be very strong confirmation of the conclusion at which I have arrived.

There will, therefore, be a declaration that the common law heir takes.

Solicitor for Gavelkind Heirs: *T. C. Matthews.*

Solicitors for Devisees of *John Garland: Keen & Rogers.*

Solicitor for other parties: *T. Sismey*, agent for *Arnold, Fooks, & Co., Gravesend.*

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[1876 S. 445.]

Specific Performance—Variation—Pleading—Misrepresentation—Person contracted with.

In defence to an action for specific performance of a contract as expressed in a document stated by the Plaintiffs, the Defendant pleaded that the document did not contain the true terms for the purchase, but he did not state what the true terms were. The Defendant afterwards produced a written agreement for purchase containing terms differing from those in the document stated by the Plaintiffs. The Plaintiffs amended their statement of claim, but continued to claim specific performance of the contract as stated by them:—

Held, that, the Plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the Defendant, the action would not be dismissed, but judgment would be given for specific performance with the variation.

Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person.

Statement.

THIS was an action by *Joseph Smith, W. Jessop, F. B. Wright,* and *F. Wright,* against *John Wheatcroft,* for specific performance of an agreement to sell a piece of freehold land called *Greaves Closes,* at *Crich,* in the county of *Derby.*

The re-amended statement of claim alleged that the Defendant *Wheatcroft* agreed to sell the piece of land to the Plaintiff *Smith* for £600, and that the agreement was expressed in writing, signed by *Wheatcroft* and delivered to *Smith,* as follows: "Received the 26th day of June, 1876, of Mr. *Joseph Smith,* the sum of £60

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deposit on account of purchase-money of the *Greaves Closes* by the brook at *Crich*. Purchase-money £600. To be completed on the 29th September next." That *Smith* entered into negotiations for the purchase of this land on his own account, but subsequently agreed with the other Plaintiffs, *W. Jessop*, *F. B. Wright*, and *F. Wright*, who carried on business as the *Butterley Colliery Company*, that they should have the benefit of the agreement, and it was ultimately entered into by him as their agent; and the Plaintiffs claimed specific performance, with an abatement in respect of the right of dower of the widow of the Defendant's father.

The Defendant by his statement of defence alleged that he had been induced by *Smith* to sign the receipt on a representation that *Smith* wished to purchase the land for his own personal use, in order to hold the same with other land belonging to him or his father, and that *Smith* knew that the Defendant was unwilling to sell to the *Butterley Colliery Company;* the Defendant further alleged that the widow of the Defendant's father was entitled to dower out of the closes; that the receipt did not contain the true terms of the agreement; and that "the agreement, if any agreement binding on the Defendant was come to, was for the purchase of the surface only of the land, with a full reservation to the Defendant of all minerals and mining rights." The statement of defence did not refer to any other written agreement; but the Defendant had in his possession a document signed by *Smith*, as follows:—

"The said *John Wheatcroft* agrees to sell and the said *Joseph Smith* agrees to purchase all those five closes of land situated in *Crich* aforesaid called the two *Greaves Closes*, by *Mold Lane*, on the west side of the brook, and the three *Greaves Closes* on the east side by the brook, and particularly named the *Upper Greaves* with the inlake or pingle, the *Meadow Spot*, the *Nether Greaves*, the *Great Close* and the *Little Close*, and containing seven acres and a half, or thereabouts, be the same more or less, and now in the occupation of *James Smith*, except and reserved all minerals, stone, and clay, and full liberty to enter at all times and search for and get the same. And the said *John Wheatcroft* agrees to sell the land for the sum of £600. Possession of the premises or receipt of the rents to be entered upon by the said *Joseph Smith* on the

29th day of September next, at which time the purchase is to be completed."

This document was mentioned in the affidavit of documents filed by the Defendant, and was then seen by the advisers of the Plaintiffs.

Statement.

The statement of claim was afterwards amended, still, as above stated, claiming performance of the agreement to sell without reservation of the minerals. The action came to a hearing, and *W. Smith* was examined on behalf of the Plaintiffs. The further facts and the result of the evidence are stated in the judgment of Mr. Justice *Fry*.

Argument.

North, Q.C., and *Hamilton Humphreys*, for the Plaintiffs:—

On the question of fraud or misrepresentation as to the real purchaser: *Phillips* v. *Duke of Buckingham* (1); *Fellowes* v. *Lord Gwydyr* (2); *Nelthorpe* v. *Holgate* (3).

Cookson, Q.C., and *R. Roberts*, for the Defendant:—

The Plaintiffs still insist on the performance of the agreement alleged by them, which is equivalent to charging the Defendant with fraud in obtaining the memorandum of agreement, and if the Plaintiffs fail in that, or in making out their allegations, the action must be dismissed. They cannot have a new term inserted in an agreement set up by them.

[FRY, J., referred to *Joynes* v. *Statham* (4), and to *London and Birmingham Railway Company* v. *Winter* (5), and suggested that the Plaintiffs should submit to the variation.]

We must admit that there was an agreement to sell, but with the minerals reserved, and the Plaintiffs cannot now change front and begin a new case: *Woollam* v. *Hearn* (6). The agreement was, however, obtained by fraud, and by the Defendant being led to think that he was selling to an adjoining landowner and not to a colliery company: *Lord Irnham* v. *Child* (7); *Cadman* v.

(1) 1 Vern. 227.
(2) 1 Russ. & My. 83.
(3) 1 Coll. 203.
(4) 3 Atk. 388.
(5) Cr. & Ph. 57.
(6) 7 Ves. 211.
(7) 1 Bro. C. C. 92.

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Horner (1); *Sugden's* Vendors and Purchasers (2); and the Court will not enforce the performance of a contract obtained in that manner.

FRY, J.:—

In this action the Plaintiffs sue for the specific performance of an agreement to sell certain closes described as the *Greaves Closes*. It is now the common case of the Plaintiffs and Defendant that there was an agreement, the Plaintiffs of course alleging that the agreement is one which ought to be performed, the Defendant, whilst admitting at the Bar there was an agreement, alleging two things, first, that the agreement sued upon by the Plaintiffs was not the true agreement, and that, under the circumstances, the variation ought to defeat the Plaintiffs' right to specific performance; and, secondly, that the agreement so entered into was tainted with fraud, to use the language of the Defendant's counsel, or, to put it more precisely as the statement of defence puts it, was obtained by misrepresentation. These are the two questions I have to determine. [His Lordship then stated the contents of the receipt and of the agreement.] It does not escape my attention that *Smith* has said that the agreement was never read over by him, and that nothing was said at the interview with regard to the reservation of the mines and minerals. But, seeing that that point was not raised by the pleadings, and that the Plaintiffs had the opportunity of shewing that the memorandum of agreement did not contain the true terms of the bargain, I think I should be going too far to allow the Plaintiffs now to say that the memorandum of agreement did not comprise the true terms. I therefore think that the Plaintiffs must be bound to submit to the terms of that written instrument or to have their bill dismissed. In that case, as I understand, the Plaintiffs ask to have the specific performance with the reservation.

Then arises the further question, whether, that being the state of things, I ought to dismiss the action because of the variation between the agreement stated by the Plaintiffs in their pleadings

(1) 18 Ves. 10. (2) 14th Ed. p. 211.

and the agreement to which, under the compulsion of the Court in a certain sense, the Plaintiffs submit. I take the general rule with regard to variations to be as stated by Lord *Cottenham* in *London and Birmingham Railway Company* v. *Winter* (1), that it depends on the particular circumstances in each case whether the variation set up from the written contract "is to defeat the Plaintiff's title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for."

Now, what are the special circumstances in this case? According to the uncontradicted evidence before me, this memorandum was never read over by *Smith*. The Plaintiffs sue upon the receipt, and it would have been more prudent on the part of the Defendant if he had made the receipt correspond more exactly than it did with the terms of the contract. The Defendant, in his statement of defence, undoubtedly sets up that the receipt did not contain the true terms or all the terms of the purchase, and that the agreement, if any agreement binding on the Defendant was come to, was for the purchase of the surface only of the land with a full reservation to the Defendant of all minerals and mining rights, but he did not state what the real agreement between the parties was. Nor did he even admit that there was any agreement, for he made it hypothetical; nor did he submit to perform the real agreement; nor was it until he filed an affidavit of documents that he disclosed this written agreement. Therefore, down to that time it does not rest with the Defendant to say that the Plaintiffs ought to have been in possession of the terms of the agreement. It is quite true that after the affidavit of documents was filed, the Plaintiffs re-amended the statement of claim, but did not adopt the memorandum of agreement; and to that extent, and to that extent only, is there any foundation for the Defendant's argument that the Plaintiffs repudiated this agreement.

It appears to me that the mere fact that the Plaintiffs so re-amended the statement of claim without adopting the terms of the agreement, is not a ground upon which I can say that it is

(1) Cr. & Ph. 62.

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inequitable or unjust that the Plaintiffs, submitting to the variation between the receipt and the agreement, should have specific performance of the agreement.

Several cases have been cited to me upon this point. The first in point of time is *Legal* v. *Miller* (1). There the Defendant set up the agreement, and fully disclosed to the Plaintiff that which he said was the true agreement between the parties, and he appears further to have submitted in effect to perform the agreement which he set up; so that the litigation would have been ended if the Plaintiff had been willing to adopt the true agreement. This appears from what the Master of the Rolls says, that it "would be very hard upon a Defendant if a Plaintiff should unconscientiously bring him into a Court of Equity when Defendant should insist on an agreement different from that which the Plaintiff sets up, and the Plaintiff should reply to his answer and insist on his former demand, and go into a long proof; and afterwards finding he cannot have the decree prayed by his bill, should resort to that which Defendant sets up, and insist on a decree for it." The next case is *Lindsay* v. *Lynch* (2). There the Lord Chancellor of *Ireland* came to the conclusion that he would be opening a door to new frauds if he allowed the Plaintiff to avail himself of the agreement which was set up, and which he had throughout refused to act upon. "On principle, therefore, for example-sake, and to prevent practices which must tend to great fraud, I conceive that the bill ought to be dismissed notwithstanding the admissions of the Defendant in his first answer;" but he allowed another bill to be filed. It appears to me that that case is not one which makes it incumbent on me to pursue the same course in this case, and I do not think I should be opening any door to fraud by allowing the Plaintiff to submit to a parol variation. The case of *Jeffery* v. *Stephens* (3) is a case in which the Defendant also set up an agreement which had from the first been repudiated by the Plaintiff. The Plaintiff had been in possession, and had throughout the period of his possession repudiated the true agreement by acting in contravention of it. There was an additional difficulty, which also was relied upon by the Master of the Rolls, that the

(1) 2 Ves. Sen. 299. (2) 2 Sch. & Lef. 1, 10.
(3) 6 Jur. (N.S.) 947.

agreement set up by the Defendant, like the agreement set up by the Plaintiff, was void for uncertainty.

These cases seem to me to be very different from this case. If in this case the Defendant had stated the terms of the agreement distinctly and precisely—if he had stated that there was one variation and one variation only on which he relied, and if in addition to that he had submitted to perform the agreement so stated, it is exceedingly likely that if the Plaintiffs after that had insisted on the other agreement I should have found it my duty to dismiss the action with costs. But, instead of stating the true agreement, the Defendant only alleged that the receipt which he himself had signed did not contain the true terms; that there was no binding agreement; and that the agreement, if any, was tainted with fraud. That head of defence therefore fails.

The next question is, whether there is fraud in the agreement. Now, the circumstances which it is material to consider on this part of the case are these:—

[His Lordship then stated what in his opinion were the circumstances proved in the case. The Defendant was minded to sell these closes of land and had offered them for sale to others. The Plaintiff *Smith* and the Defendant had an interview on the 16th of June, when the Defendant asked £600 and *Smith* offered £585: and his Lordship expressed his opinion that the statements then made by *Smith* were not misrepresentations, but were arguments to induce the Defendant to let *Smith* have the land at a lower price. *Smith* then made up his mind not to buy, but in the meantime he found that the *Butterley Company* were willing to buy at that price, and on the 26th of June he had another interview with the Defendant, and the agreements were signed. The Defendant had not suggested that he had sold the land to the Plaintiff *Smith* for less than he would have taken from any one else, and his Lordship was of opinion that this defence was an afterthought. No doubt on the 16th of August the Defendant wrote a letter in which he said he had been deceived. But even in that letter he did not suggest that he had taken less from *Smith* than he would have taken from any one else. His Lordship then continued:—]

Now, it appears to me that on the general question I cannot try

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the case more favourably than by applying the principle laid down by *Pothier, Traité des Obligations*, § 19. He says, "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." I ask myself here whether the Defendant has shewn that any personal considerations entered into this contract? Has he shewn me that he would have been unwilling to enter into a contract in the same terms with anybody else? I say distinctly that he has failed to produce such an effect on my mind, and that being so, I think the second head of defence must fail as well as the first.

The result is, that I give judgment for specific performance with the reservation of the minerals. There will be the usual inquiry as to title, and the Plaintiffs must have the costs of the action.

Solicitors for Plaintiffs: *Johnson & Weatheralls.*
Solicitors for Defendant: *Chester & Co.*

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June 18.

[1876 L. 225.]

Will—First Codicil—Revocation—Second Codicil—Confirmation.

Where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed.

A testatrix by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised certain after-purchased property to the trustees of her will and confirmed her will :—

Held, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone.

Crosbie v. *MacDowal* (1) and *Burton* v. *Newbery* (2) observed upon.

Statement.

ELIZABETH LOVE, by her will dated the 9th of February, 1872, gave to trustees the sum of £1000 upon trust to invest the same, and to pay the income to her niece *Ellen Love* during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two-sixteenths thereof to pay the same unto her nephew *Stephen Love*, and as to two other sixteenths thereof upon such trusts for the benefit of her niece *Ellen Love* and her issue as were therein declared of the said sum of £1000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows :—"This is a codicil to the last will and testament of me, *Elizabeth Love*, of *Filstone*, in the parish of *Shoreham*, in the county of *Kent*, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favour of my niece *Ellen Love* and my nephew *Stephen Love* respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows :—"This is a codicil to the last will and testament

(1) 4 Ves. 610. (2) 1 Ch. D. 234.

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of me, *Elizabeth Love*, of the parish of *Shoreham*, in the county of *Kent*, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, *Camden Villa, London Road*, in the parish of *Sevenoaks*, in the county of *Kent*. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10, *Granville Road*, in the said parish of *Sevenoaks*, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother *Samuel Love*, my brother-in-law *John Tribe*, my nephew *Frank Green*, and *William Francis Holcroft*, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother *Samuel Love* for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case *Stephen Love* and *Ellen Love* would take each two-sixteenths, or would go according

to the will and first codicil together, in which case *Stephen Love* and *Ellen Love* would take nothing.

Argument.

North, Q.C., and *G. E. Cruikshank*, for the Plaintiff:—

The effect of the second codicil is to prevent the shares of *Stephen Love* and *Ellen Love* from lapsing, and to give the property in twelfths and not in sixteenths. As to the effect of a second codicil on a first codicil: *Crosbie* v. *MacDowal* (1); *Aaron* v. *Aaron* (2); *Gordon* v. *Lord Reay* (3); *Burton* v. *Newbery* (4); *Pigott* v. *Wilder* (5); *Farrer* v. *St. Catherine's College* (6).

Cookson, Q.C., and *Macnaghten*, for other parties.

C. Browne, for the heir of the testator.

Kekewich, Q.C., and *Badcock*, for *Ellen Love*:—

No doubt the codicil may refer to another codicil, but it must be clear. The law has been altered by the *Wills Act*, s. 54.

North, in reply:—

The second codicil is not inoperative, and has the effect of making the property go in twelfths. Even if that is not so, the testatrix may have thought she had good reason to make the codicil.

Judgment.

June 18. FRY, J., after stating the facts of the case, continued:—

It appears from the statements made by the Plaintiff, which are not disputed by the Defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will and testament there referred to had been described by its proper date, and as if the testatrix had

(1) 4 Ves. 610.
(2) 3 De G. & Sm. 475.
(3) 5 Sim. 274.
(4) 1 Ch. D. 234.
(5) 26 Beav. 90.
(6) Law Rep. 16 Eq. 19.

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declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me. First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore *Ellen Love* and *Stephen Love* to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord *Penzance* in *Lemage* v. *Goodban* (1), "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer. The first to which I desire to

(1) Law Rep. 1 P. & M. 57.

refer is the case of *Crosbie* v. *MacDowal* (1). There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil. In the case of *Smith* v. *Cunningham* (2) a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The Court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favour of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough* v. *Martin* (3)), there was no intention to revoke. In *In the Goods of De la Saussaye* (4), a case which came before Sir *James Hannen* in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in *Spain*, he then made a codicil in *England* by which he revoked certain dispositions contained in his will, which he described as executed in *London* on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere

(1) 4 Ves. 610.
(2) 1 Add. 448.
(3) 2 Add. 239.
(4) Law Rep. 3 P. & M. 42.

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with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The Court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigour of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon* v. *Lord Reay* (1); there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of *England* held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron* v. *Aaron* (2), the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The Court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton* v. *Newbery* (3), the present Master of the Rolls took a different view. There the testator made a

(1) 5 Sim. 274.
(2) 3 De G. & Sm. 475.
(3) 1 Ch. D. 234.

will before the *Wills Act*, under which *A.* and *B.* took shares of the proceeds of his real estates. By a codicil made after the *Wills Act*, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by *A.* and *B.*, who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigour to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon* v. *Lord Reay* (1), but referring without disapproval to the earlier case of *Crosbie* v. *MacDowal* (2).

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must if left to itself fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application: *Doe* v. *Hicks* (3); *Farrer* v. *St. Catherine's College* (4).

I conclude, therefore, that the decision of the Master of the Rolls in *Burton* v. *Newbery* (5) does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie* v. *MacDowal* and the cases which have fol-

(1) 5 Sim. 274.
(2) 4 Ves. 610.
(3) 8 Bing. 475.
(4) Law Rep. 16 Eq. 19.
(5) 1 Ch. D. 234.

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lowed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice *Blackstone* describes it (1), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the Ecclesiastical Courts. In the case of *Wade* v. *Nazer* (2), the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Upfill* v. *Marshall* (3), the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring *Ellen Love* and *Stephen Love* to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit *Ellen Love* and *Stephen Love* to the benefit of the original dispositions intended for them.

(1) 2 Bl. Com. 450, Kerr's Ed. (2) 1 Rob. Ecc. 627.
(3) 3 Curt. 636.

This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore *Ellen Love* and *Stephen Love* to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it. The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.

Solicitors: *Crowder, Anstie, & Vizard; Makinson & Carpenter; Monckton, Long, & Co.*

KIRKWOOD *v.* WEBSTER.

[1876 K. 16.]

Costs—Taxation—Party and Party—Costs of three Counsel—Copies of Shorthand Writer's Notes of Evidence.

In a case of considerable complication, in which charges of fraud were made against the Defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the Taxing Master had only allowed the costs of two.

The rule laid down by *Turner*, L.J., in *Pearce* v. *Lindsay* (1) explained.

The costs of making for the use of counsel copies of a shorthand writer's notes of evidence taken at the trial will not be allowed as between party and party, unless a special direction to that effect is given by the Judge at the trial.

Pa 1486
46 D 2
6 QBD 163

THIS was a motion to review the Taxing Master's taxation of the Defendant's costs of the action.

(1) 1 D. F. & J. 573.

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Statement.

The action was brought to set aside some purchases of shares in patents made by the Plaintiff from the Defendant, and to obtain repayment of the purchase-money, on the ground that the Plaintiff was induced to make the purchases by means of wilful misrepresentations made to him by the Defendant as to the value of the patents. The Plaintiff alleged that the patents were to the knowledge of the Defendant entirely worthless. The Plaintiff also claimed damages for a loss which he alleged that he had sustained through wilful misrepresentations of the Defendant, whereby he was induced to enter into an agreement for the purchase from the Defendant of some manufacturing premises. The trial of the action commenced before Mr. Justice *Fry*, on the 2nd of July, 1877, and continued from day to day until the 7th of July, when the Plaintiff abandoned his case, and judgment was given for the Defendant with costs. At the trial the Plaintiff was represented by two counsel, and the Defendant by three. A shorthand writer was employed to take notes of the oral evidence. The Plaintiff supplied copies each day of the notes taken of the previous day's evidence to the Judge. The Defendant had a copy made for the use of each of his counsel. In taxing the costs the Taxing Master disallowed the costs of the Defendant's third counsel. The Defendant objected, but the Taxing Master overruled his objection, observing, "I have not been able to come to the conclusion that the Defendant's case comes within the rule laid down by Lord Justice *Turner* in *Pearce* v. *Lindsay* (1), that before the costs of three counsel are allowed, it should, in each case, be clearly shewn to have been essentially necessary, for the purpose of doing justice between the parties at the hearing of the cause, that three counsel should be employed."

The Taxing Master also disallowed the costs of the copies of the shorthand notes made for the Defendant's counsel. In answer to the Defendant's objection, the Taxing Master said, "The Taxing Master has no authority to allow in a taxation between party and party the costs of employing shorthand writers to take notes of the evidence on the trial, or of copies of such notes, unless specially directed by the Judge. No such direction has been given in the present case, and I accordingly disallowed the charge."

(1) 1 D. F. & J. 573.

Rigby, for the Defendant:—

Argument.

In *Pearce* v. *Lindsay* (1), the costs of three counsel were allowed, though only two had been employed in the Court below. In that case there was a mass of affidavits. And in the present case the notes of the *vivâ voce* evidence at the trial extend to some thousands of folios, and evidence taken in that way is more difficult for counsel to deal with than evidence by affidavit, which is in print before the trial. On a question of this kind the Court is in a better position to judge than the Taxing Master.

[FRY, J.:—So I have heard the late Lord *Romilly* say.]

[He referred also to *Wentworth* v. *Lloyd* (2); *In re Charles Laffitte & Co.* (3).]

Charles Browne, for the Plaintiff:—

The trial occupied so long a time, because the Court was very adverse to the Plaintiff. He adduced more evidence than he originally intended.

[FRY, J.:—I had the greatest difficulty in finding out what your case was, the charges of fraud were so general.]

That shews that the Defendant did not require three counsel to meet so vague a case. The rule laid down in *Pearce* v. *Lindsay* applies. The Plaintiff, on whom was the burden of proof, had only two counsel. If the Taxing Master has exercised his discretion upon the facts of the case, and has not merely acted on the general rule, the Court will not interfere: *Midland Railway Company* v. *Brown* (4). It must be a very strong case to induce the Court to sanction the costs of more than two counsel: *Smith* v. *Buller* (5).

FRY, J.:—

Judgment.

Though I feel, as other Judges have done, that in cases of this kind I ought not, without very strong reasons, to differ from the conclusion of the Taxing Master, I must in the present case dissent from his conclusion, and hold that the Defendant was entitled to employ three counsel. I think that the case falls

(1) 1 D. F. & J. 573.
(2) Law Rep. 2 Eq. 607.
(3) Law Rep. 20 Eq. 650.
(4) 10 Hare, App. xliv.
(5) Law Rep. 19 Eq. 473, 481.

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within the rule laid down by Lord Justice *Turner* in *Pearce* v. *Lindsay* (1), and that it was essentially necessary for the purpose of doing justice that three counsel should be employed. I do not speak of a physical or a mathematical necessity, but I think that the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel. There were no less than eight distinct charges of fraud and misrepresentation made by the Plaintiff against the Defendant. No less than three contracts, relating to no less than five patents, were in question, and other patents entered into the history of the case. The questions of fact and the questions of character involved were of a very complicated nature. The opening of the case occupied no less than a week, and the Plaintiff then retired. I think that the Defendant was fully justified in employing three counsel, and therefore I shall allow the costs of the third counsel.

Rigby, for the Defendant:—

The costs of the copies of the shorthand writer's notes of the evidence which were furnished to the Defendant's counsel as part of their briefs ought also to be allowed. The Plaintiff supplied copies of the notes for the use of the Judge, and it was essential that the Defendant's counsel should also have copies. Such costs have been allowed in the Court of Bankruptcy: *Ex parte Smith* (before *Bacon*, C.J., April 1, 1878).

[FRY, J.:—The Taxing Master says that he has no authority to allow these costs unless a special direction is given by the Judge. Ought not that direction to be given in the judgment?]

It may be given afterwards.

Charles Browne, for the Plaintiff, was not heard.

FRY, J.:—

If the practice is as the Taxing Master has stated, I cannot deviate from it. I shall, therefore, not allow these costs. I give no costs of the motion.

Solicitor for Defendant: *James Neal.*

Solicitors for Plaintiff: *Minet, Smith, Son, & Harvie.*

(1) 1 D. F. & J. 573.

DICKSON *v.* HARRISON.

C. A.
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[1877 D. 188.]

Practice—Appeal from Motion to discharge Order of Judge in Chambers—Time within which such Motion may be brought—Judicature Act, 1873, *s.* 50—*Rules of Court, Order* LVIII., *r.* 15.

Where a motion has been made under the 50th section of the *Judicature Act*, 1873, to a Divisional Court or Judge in Court, to discharge an order made by a Judge in Chambers, an appeal lies within twenty-one days to the Court of Appeal from an order refusing such motion.

Order LVIII., rule 15, of Rules of Court, 1875, limiting the time for bringing appeals, does not apply to the time for making motions before a Divisional Court or a Judge in Court to discharge an order in Chambers; but in the Chancery Division the practice is, that no such motion shall be made without special leave after twenty-one days.

Statement.

IN this action the Defendants were ordered to make an affidavit of all documents relating to the matters in question in the action, and to produce the same for inspection; and on the 12th of March, 1878, they filed an affidavit of documents which did not include some which the Plaintiff considered that she was entitled to see.

On the 1st of April, 1878, Vice-Chancellor *Hall*, to whose Court the action was attached, made an order in Chambers to the effect that the affidavit of the Defendants was insufficient, and that they must make a further affidavit, setting out certain accounts and other documents to which special reference was made in the order, without prejudice to any question as to the right of inspection. This order was drawn up and entered on the 20th of April.

On the 7th of May the Defendants gave notice of motion before the Vice-Chancellor sitting in Court to discharge the order. The motion was heard on the 16th of May, when the Vice-Chancellor refused the application, and from this decision the Defendants on the 22nd of May gave notice of appeal. The appeal was heard on the 18th of June.

Argument.

Everitt (*Dickinson*, Q.C., with him), for the Appellants.

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DICKSON v. HARRISON.

Argument.

Morgan, Q.C., and *E. Cutler*, for the Plaintiff, took a preliminary objection to the hearing of the appeal:—

The motion in Court to discharge the order made in Chambers was altogether refused; therefore the order made in Chambers still stands, and that is in effect the order which is now appealed from. That order was entered on the 20th of April, and it is now too late, under Order LVIII., rule 15, to appeal from it. If the time for appealing from an order in Chambers is to date from the refusal by the Judge in Court to disturb it, it will be in the power of parties to enlarge the time for appealing to the Court of Appeal for an indefinite time, because there is no rule limiting the time within which a Judge can rehear in Court an order which he has made in Chambers: *In re Elsom* (1); *White* v. *Witt* (2).

Everitt was not called on.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

I think the objection cannot be maintained, and as the matter is of importance as regards the practice of the Court of Appeal, I shall give my reasons for saying so.

Under the 50th section of the Act of 1873, "Every order made by a Judge of the said Court in Chambers" (except certain orders which need not be referred to) "may be set aside or discharged upon notice by any Divisional Court or by the Judge sitting in Court according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal." It has been found in practice, however, that that section led to very great and unnecessarily increased expense in the Chancery Division, because where the Judge had considered his order in Chambers it was an unnecessary expense to make a fresh motion before the same Judge. Therefore the Court of Appeal gave special leave very readily to avoid that expense, and it is laid down in reported cases upon what ground that leave will be given without a formal motion for the purpose,

(1) 6 Ch. D. 346. (2) 5 Ch. D. 589.

namely, where the Judge certifies that he does not wish the case to be reheard, or where the Court of Appeal is otherwise satisfied that the case has been deliberately decided by the Judge from whom the appeal comes. But where a motion is actually made before the Judge in Court, the course pointed out by the section has been literally pursued, and he therefore has jurisdiction to entertain the application.

Then another question arises: whether there shall be any time limited in which the application should be made to set aside the order in Chambers by the Judge himself. It appears to me reasonable that there should be a limited time. I think I mentioned in the course of the argument that by analogy to the rules as regards appeals on interlocutory matters I have made it in my Court twenty-one days, and it appears to me, speaking now as a Judge of the Court of Appeal, that that is a reasonable and proper time to fix, but of course the Judge in the Court below can for special grounds enlarge that time at his own discretion. That being so, when we turn to the 19th section of the *Judicature Act*, 1873, we find that "the said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order save as hereinafter mentioned." It is not necessary to advert to these exceptions, or to some further exceptions which were introduced by the Act of 1875, because they do not affect the question now before the Court. Then it follows that when the Judge sitting in Court has made an order either affirming or reversing what he has done in Chambers, that order is subject to appeal, and the only limit to an appeal from an interlocutory application is the 15th rule of Order LVIII., which prevents the bringing of any appeal from an interlocutory order except by special leave after the expiration of twenty-one days from the refusal if the order has been refused, or from the drawing up of the order if the order has not been a simple refusal. Now, that being so, even assuming that the rule, which I have already stated to be reasonable, had been enforced in this case, the application was made in due time. It was made to the Vice-Chancellor within the twenty-one days from the time the application was made in Chambers, and the appeal from that order is also made in time. It appears to me to be utterly immaterial whether the Judge did or did not express a

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wish to have the case argued again before him in Court. He did not give a certificate that he did not desire it to be argued, and therefore it was open to the parties, if they thought fit, to have the matter argued before the Judge in Court. It is obvious there may be cases in which it would be more desirable to pursue that course than to appeal directly. In the first place, although it does sometimes happen, it is not usual for Queen's Counsel to appear in Chambers. They have a right to do so, and they do sometimes, but it is not usual, because they are generally engaged in cases of importance, which will take more time than a Judge has at his disposal in Chambers. In the next place, if it is a matter of great importance, or considerable legal difficulty, speaking from my own experience, it is impossible for the Judge, considering the number of applications that he has to dispose of in Chambers, to give sufficient time to the hearing or determination of such matters there, and therefore it is very proper that they should be discussed in Court; and there may be reasons which induce the parties to think that the Judge may alter his opinion when the matter is brought before him in Court. That being so, the parties having followed the Act of Parliament, it appears to me they have a right to ask the Appeal Court to hear and decide on the matters on appeal.

Brett, L.J.

BRETT, L.J.:—

It seems to me that the order of the 1st of April was the order to which section 50 of the *Judicature Act* of 1873 applies. It was an order made by a Judge of the High Court. Unless some motion had been made to the Judge in Court, or something which is treated by the Court as equivalent to such motion, it seems to me that, according to the 50th section, there could have been no appeal whatever with regard to the order of the 1st of April. The 50th section says: "Every order made by a Judge of the said High Court in Chambers" (except discretionary orders) "may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court." But then it says, "and no appeal shall lie from any such order"—that "such order" in that part of the section seems to me to be the order made by the Judge in Chambers—"no appeal shall lie from any such order to set aside or discharge which no such motion has been made." No doubt

the phraseology there is strange, for there is no mention in the former part of the section of a motion in terms. But I apprehend that that is the motion which is described in the former part of the section under the phrase "may be set aside or discharged"—that requires a motion. Therefore, upon the construction of that section, there could not be an appeal against the first order unless there were a motion in the Divisional Court or before the Judge himself in Court to set aside or discharge such order, or something which has been treated as equivalent, without special leave. Now, as I understand from the explanation of the Master of the Rolls, there is something in the Chancery Division which is treated as equivalent to such a motion, namely, the certificate by the Judge that he had heard and decided the case in Chambers. Therefore, without special leave, there is no appeal from the first order to this Court. There is an appeal in the first place to the Divisional Court or to the Judge, and then that Divisional Court or the Judge, hearing the case on motion from himself, makes a new order. That order is one which may be or may not be the subject of appeal. It is not denied that if that order made by the Divisional Court or the Judge in Court differs from the order of the Judge in Chambers, there is an appeal from the order of the Divisional Court or of the Judge sitting in Court. But it is suggested that if the Divisional Court or the Judge sitting in Court affirms his former decision, there is no appeal. That would seem to me to be a very curious anomaly, that there is to be an appeal if he decides one way, and that there is to be no appeal if he decides in another way. I cannot think that can be so, particularly as it seems to me that the order of the Divisional Court or the order of the Judge made in Court is directly within the terms of the 15th rule of Order LVIII., and it certainly applies; that is, that within twenty-one days there is to be an appeal. The 19th section of the Act says there is an appeal from every order. That gives an appeal from the Divisional Court or the Judge sitting in Court. Then the 15th rule of Order LVIII. says within what time that appeal is to be made. If there is an order drawn up or a judgment, then the time is to be "calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal"—shewing thereby

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that there is to be an appeal from the refusal exactly in the same way as if the order were made—" or in the case of the refusal of an application from the date of such refusal." It seems to me that the rule is in strict compliance with the section of the Act.

Judgment, Brett, L.J.

There was an appeal here from this refusal, and that appeal is properly brought if it is brought within the twenty-one days from the time of such refusal, and therefore I think this application is in time, whether the Judge expressed any opinion or not.

Cotton, L.J.

COTTON, L.J. :—

I also am of opinion that the preliminary objection fails. It seems to me that the 50th section of the Act of 1873, combined with the 19th section, decides the case.

This was an order made by the Judge of the High Court in Chambers, and that was an order which could not be appealed from to this Court direct unless by special leave of the Judge or of the Court of Appeal. When the Judge gives a certificate that he does not require the matter to be argued further, that is considered as a permission given by him to come direct to the Court of Appeal, and if the Court of Appeal is satisfied that the matter has been fully discussed, it gives leave to appeal direct from the order made in Chambers, without what is required by this section under ordinary circumstances, a motion to the Judge in Court to discharge the order made in Chambers. But although under special circumstances by special leave there may be an appeal to this Court direct from an order made in Chambers, yet the ordinary case is that in the first instance there shall be a motion to the Judge in Court—I am speaking of the Chancery Division—to discharge his order. The 50th section, therefore, shews that in this case the Judge acted within his jurisdiction in the way contemplated by the Act of Parliament in entertaining a motion to discharge the order made by him in Chambers. That being so, it is an order coming within sect. 19—not within the exceptions contained in that section—appealable to this Court, and an appeal lies from that order so made by the Judge in Court under sect. 50, within twenty-one days, or within the time limited by the General Orders. But then it is said that in substance it is an appeal from an order made in Chambers on the 1st of April.

That is true. But then turn to rule 5 of Order LVIII. When we have an appeal before us from an order made by the Vice-Chancellor in Chambers, or on an application to him to discharge his own order made in Chambers, we are required to make such order as the Judge himself ought to have made when the application was made to him on which he made the order which is appealed from. That being so, if we should be of opinion that he on that application ought to have discharged his order, we ought to do the same; but the appeal is to us from the order made by him in Court, either affirming or discharging the previous order made by himself in Chambers. Certainly it appears that there is no time limited by the General Orders within which a Judge may be asked in Court or moved in Court to discharge an order made by him in Chambers. I quite agree with the Master of the Rolls that under ordinary circumstances twenty-one days is a reasonable time in which such notice should be given, but I must not be understood as in any way limiting, or desiring to express an opinion that the Judges in the Chancery Division should limit under all circumstances the time for moving to discharge particular orders. Under special circumstances it would be quite right that they should extend that time and allow applications to discharge orders made in Chambers, though notice to discharge them has not been given within the time limited for appeals on interlocutory orders.

BRETT, L.J.:—

I quite agree as to the propriety of the time suggested in the Chancery Division, but I should be loth to say anything which would lead to alterations in the practice in the other Divisions, where I think there is a time limited.

The appeal was then heard on the merits, and the Court varied the order made by the Vice-Chancellor.

Solicitors: *Harrison, Beal, & Harrison; Dillon-Webb, Kelly, & Co.*

C. A.
1878
June 19.

BOYNTON *v.* BOYNTON.

[1871 B. 175.]

Costs—Legal Personal Representative—Revivor.

A Plaintiff died after having obtained a decree with costs, and having appointed one of the Defendants, who had a concurrent interest with her, her executor. Two others of the Defendants served notice of appeal. The executor after this obtained the common order of revivor. The appeal afterwards came on to be heard, and the bill was dismissed with costs as against the Appellants:—

Held, that the executor had adopted the suit for all purposes, and that the costs were payable by him personally, and not merely out of the estate of the original Plaintiff.

Referred to 44 L.J. Ch. 783

Statement.

THIS was a suit by Lady *Boynton* to have it declared that a settlement of the 30th of March, 1871, executed by her was obtained by undue influence, to have the indenture delivered up to be cancelled, and to have the costs of the suit paid by the Defendant, *G. H. L. Boynton*. Notice of motion for decree was given on the 11th of June 1872, and on the 13th of November, 1876, Vice-Chancellor *Hall* made a decree declaring that the Plaintiff's execution of the settlement was obtained by undue influence, and that the settlement was void, and ordering it to be delivered up to be cancelled. The Defendant, *G. H. L. Boynton*, was ordered to pay the Plaintiff her costs of the suit.

On the 26th of June, 1877, the Plaintiff died, having appointed *Charles Boynton*, one of the Defendants to the suit, her executor, and he proved the will on the 14th of September, 1877. He had been a party to the suit as having a concurrent interest with the Plaintiff in having the settlement of the 30th of March, 1871, set aside.

On the 6th of November, 1877, two of the Defendants served on *Charles Boynton* and the other Defendants notice of appeal from the decree.

On the 19th of November, 1877, *Charles Boynton*, as executor of the Plaintiff, obtained the common order that he might be at liberty to carry on and prosecute the suit against the other

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Defendants in like manner as the Plaintiff might have done if she had not died.

On the 16th of April, 1878, the Court of Appeal decided that the settlement in dispute was valid, and that the bill ought to have been dismissed with costs as against the Defendants who opposed the decree.

Statement.

The case now came before the Court of Appeal on an application to vary the minutes of the order of that Court, the question being whether it ought to be so worded as to make the costs payable by *Charles Boynton* out of the assets of Lady *Boynton* only, or to make them payable by him personally, leaving him to recoup himself out of her estate, if any.

Argument.

W. Pearson, Q.C., and *Everitt*, for *Charles Boynton* :—

The costs ought not to be payable by the executor personally. The decree ought to have the same operation as if it had been made in Lady *Boynton's* lifetime, dismissing her bill with costs, in which case the costs would only have been payable out of her estate. If there had been a revivor before judgment in the Court below, we should not dispute the liability of the executor to pay costs personally.

Dickinson, Q.C., and *Maclean, contrà* :—

Charles Boynton has adopted the suit, and must be liable to costs as if he had instituted it: *Daniell's* Chancery Practice (1); *Horlock* v. *Priestley* (2).

W. Pearson, in reply.

Judgment, James, L.J.

JAMES, L.J. :—

I am of opinion that the order ought to give costs against *Charles Boynton* personally, and that it is impossible to distinguish this case from *Horlock* v. *Priestley*. It seems to me that the general principle is this, that if a party to a litigation dies at any stage of it, his legal personal representative must then consider whether he will or will not adopt the litigation. It does not signify in what stage the litigation is—whether the death takes place before

(1) Pages 1244, 1284.

(2) 8 Sim. 621.

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the original hearing or before the rehearing in the Court of Appeal; it is for him to say whether he will or will not further prosecute the matter. If he elects to go on, it is impossible to draw a distinction as to the stage at which the suit has arrived when he elects so to continue it; if he elects to continue it, he must pay the costs like any other litigant, without prejudice to any right which he may have to get his costs out of the estate which he represents. It is impossible not to see that the order which *Charles Boynton* obtained to continue the suit was not wanted for the purposes of the appeal, but was wanted and was obtained by him for the purpose of enforcing for his own benefit that part of the decree which remained to be completed, that is to say, the part relating to those costs to which, as the decree originally stood, he was entitled. He adopted the suit, in my opinion, as completely as a legal personal representative could do. He has adopted with it all the consequences, and must pay the costs.

Brett and Cotton, L.JJ. BRETT and COTTON, L.JJ., concurred.

Solicitors: *Johnson, Upton, & Co.; Sharp & Ullithorne.*

C. A. 1878 *June* 20.

Ex parte DRESSLER. *In re* SOLOMON.

Leasehold Property of Bankrupt—Omission of Trustee to disclaim—Possession taken by Trustee—Personal Liability of Trustee for Rent—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 23, 24, 35, 72.

A trustee in bankruptcy who takes actual possession of leasehold property of the bankrupt, and does not, when called upon by the landlord so to do, disclaim the lease in the way provided by sect. 23 of the *Bankruptcy Act*, 1869, is personally liable for the rent which accrues due after he takes possession.

Sect. 35 of the Act only gives the landlord a right of proof for the proportionate part of the rent up to the date of the adjudication, but does not relieve the trustee from his personal liability.

Semble, the Court could not have decided this question in the absence of the submission of the parties.

5 Ex D. 161-2-3 — 171 9 QBD 479, 481 489, 493 23 Ch D 116. 11 QBD 96

Statement. THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

C. A. 1878 *Ex parte* DRESSLER. *In re* SOLOMON. Statement.

Joseph Solomon, a dealer in works of art, occupied a shop, No. 47 *South Audley Street*, as tenant to *J. A. Dressler*, at a yearly rent of £130, payable quarterly. On the 10th of February, 1878, *Solomon* filed a liquidation petition. The first meeting of the creditors was held on the 6th of March, when a liquidation by arrangement was resolved upon, and *D. E. Solomon* and *W. L. Clifton Browne* were appointed trustees. At this time the quarter's rent due at Christmas, 1877, had not been paid. The trustees took actual possession of the shop, and the debtor's effects in it. *Dressler* put in a distress for the Christmas rent, and the trustees thereupon paid it to him. Before the 25th of March all the debtor's effects were removed from the shop, they having been sold by the trustees on the 21st of March. *Dressler* was therefore unable to distrain for the quarter's rent due the 25th of March. On the 11th of April his solicitor wrote to the trustees' solicitor, "Do your clients, the trustees, intend to keep possession of the premises in *South Audley Street?* My client will certainly look to them for the rent, and I shall be glad if you will let me have a cheque for the rent due 25th of March last as promised." On the 13th of April the key of the shop was sent to *Dressler*, and was accepted by him, but the rent was not paid. On the 14th of April the trustees' solicitor wrote to *Dressler's* solicitor, saying that *Dressler* must prove for the rent due at Lady Day, and rank with the other creditors. The trustees executed no written disclaimer of the lease. Further correspondence took place, but the rent was not paid, and on the 22nd of August, 1877, *Dressler* commenced an action in the Exchequer Division against the trustees for the Lady Day rent. On the 11th of December, 1877, the trustees applied to the Court of Bankruptcy for an order restraining further proceedings in the action. Upon the hearing of this application by Mr. Registrar *Pepys*, acting as Chief Judge, *Dressler's* counsel stated that he was willing that the question in the action should be determined by the Court of Bankruptcy, and "*Dressler* by his counsel, consenting that an injunction shall be granted restraining the continuance of the action, and the trustees submitting to the jurisdiction of the Court in respect of the matters in difference between them and *Dressler*," it was by consent ordered that all further proceedings in the action should be

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Statement.

stayed, and that the costs of all parties of the action and of the application should be reserved to be dealt with thereafter by the Court, and all parties were to be at liberty to apply to the Court as they might be advised. After this *Dressler* applied to the Court for an order that the trustees should personally, but with liberty afterwards to recover the same out of the estate, pay him the sum of £32 10s., the quarter's rent of the shop due at Lady Day, 1877, and the costs of the action and of the applications to the Court of Bankruptcy. On the 2nd of April, Mr. Registrar *Pepys*, acting as Chief Judge, refused this application, and ordered *Dressler* to pay the costs of it, as well as the costs reserved by the order of the 11th of December. *Dressler* appealed. The appeal was heard on the 20th of June, 1878.

Argument.

Roxburgh, Q.C., and *E. C. Willis*, for the Appellant:—

The trustees are personally liable for the quarter's rent. The Court of Bankruptcy has jurisdiction to decide the question: *Bankruptcy Act*, 1869, ss. 20, 72. At any rate, if there is any difficulty as to jurisdiction, it is removed by the submission of the parties.

JAMES, L.J:—The personal liability of the trustees is not a matter relating to the administration of the debtor's estate. Do the trustees wish the action to proceed?

Patchett, Q.C., and *Tatlock*, for the trustees:—

We desire to have the question decided by this Court. The trustees remained in possession only for the purpose of realizing the debtor's assets. They are not personally liable for the rent; the landlord's only remedy is against the estate of the debtor: *Bankruptcy Act*, 1869, ss. 23, 24, 31; *Ex parte Llynvi Coal and Iron Company* (1); *Ex parte Davis* (2). The acceptance of the key by the landlord operated as a disclaimer under sect. 23.

[JAMES, L.J.:—In *Ex parte Davis* the question was as to a personal contract of the bankrupt. There was no legal liability on the part of the trustee. Here, if the trustees are liable, it is as assignees in possession of the land. The liability to the rent

(1) Law Rep. 7 Ch. 28. (2) 3 Ch. D. 463.

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follows the possession. Under the old law, if an assignee in bankruptcy took possession of the bankrupt's leasehold property he was considered to have elected to take the lease.]

Argument.

Under the old law the estate remained in the bankrupt until the trustee had elected, now it vests in the trustee immediately on the adjudication. Why should the trustee be personally liable for the rent for the period between the adjudication and his appointment? The logical result of the argument is that the Registrar, who is trustee until a trustee is appointed by the creditors, becomes personally liable.

[JAMES, L.J.:—The effect of the old law is shewn by the observations of Lord *Ellenborough* in *Hanson* v. *Stevenson* (1). Was that law in any way altered until sect. 23 of the present Act was passed?

BRETT, L.J.:—And is not the result of the decision in *Ex parte Davis* (2) this, that, if sects. 23 and 24 are not strictly followed, the legal rights remain as they were under the old law?]

What is a trustee in bankruptcy to do? He must have time to make up his mind whether he will disclaim or not.

[JAMES, L.J.:—He need not take possession.]

Sect. 35 gives the landlord a right to prove for the proportionate part of the quarter's rent up to the date of adjudication, *i.e.*, in the case of a liquidation by arrangement, the date of the appointment of the trustee. The trustees, therefore, are at any rate only personally liable for the proportionate part of the rent from the 6th to the 25th March. There cannot be a right of proof, and also a personal liability on the part of the trustee.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Registrar cannot be sustained. The trustees may not have been well advised in the course which they have adopted, but they have not proceeded in the way pointed out by sects. 23 and 24 of the Act; they have not executed any disclaimer of the lease in writing. What we decided in *Ex parte Davis* was that we could not enlarge the words

(1) 1 B. & A. 303, 307. (2) 3 Ch. D. 463.

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Judgment, James, L.J.

of those sections or of sect. 25 so as to alter pre-existing legal rights any further than they are actually altered by those sections. What, then, were the legal rights of an assignee in bankruptcy with regard to leasehold property of the bankrupt before the passing of the *Bankruptcy Act*, 1869? Under the old law, if the assignee elected to take possession of the bankrupt's leasehold property he became, by reason of his privity of estate, personally liable for the payment of the rent. He could get rid of his liability by assigning the lease to a pauper, but, if he took possession of the property, he made himself liable to pay the rent. It is not contested in the present case that actual possession of the property was taken by the trustees, and, indeed, it is manifest from the correspondence that the trustees knew that they were in possession, and that they had actually promised to send a cheque for the rent which became due in March. That being the legal effect of possession being taken by the trustees, the result is that they are liable as assignees of the estate to pay the rent, and, as between themselves and the landlord, they are personally liable, though they are entitled to an indemnity out of the debtor's assets. And no injustice will be done to them, for they ought to have retained out of the assets a sum sufficient to answer the rent. There will be an order, therefore, for payment of the quarter's rent to the Appellant, and he must have his costs.

Brett, L.J.

BRETT, L.J.:—

I take the facts to be that, after the appointment of the trustees, and during the currency of the quarter in respect of which the rent is claimed, the trustees took actual possession of the leasehold premises, and that they remained in possession until after the quarter had expired. After the letter of the 11th of April, by which the trustees were in substance asked whether they intended to disclaim, they sent the key of the premises to the landlord, and he accepted it. But they never executed any disclaimer of the lease in writing. The question is whether the trustees are personally liable for the rent of the March quarter. I think that they are. Under the old law they would have been personally liable, on the ground that, by taking actual possession of the property, they had elected to accept the lease, and had adopted the assign-

ment which had been made to them. Is there anything in sects. 23 and 24 of the *Bankruptcy Act*, 1869, to take away that liability? Sect. 23 is in relief of the trustee, but, in order to obtain the benefit of it, he must bring himself within its terms. If the trustee wishes to obtain the benefit of sect. 23, which he may do although he has taken actual possession of the property, he must disclaim the lease by a writing under his hand; if he does not do this, he is not entitled to the relief given by the section. He may execute the disclaimer at any time, except so far as he is prevented by sect. 24. After an action had been brought for the rent he might, at any rate within twenty-eight days from the issuing of the writ, disclaim, and I am disposed to think that the action could not then be maintained. At all events he could disclaim at any time before action. In the present case the notice referred to in sect. 24 was given by the landlord in the letter of the 11th of April. Then the trustees did that which would work a surrender of the lease at law, by sending the key to the landlord, which he accepted. That effected a surrender of the lease by operation of law, and not by virtue of a disclaimer under the Act. What is the real effect of sect. 24? It appears to me that if a trustee takes possession of the bankrupt's leasehold property, the landlord may give notice to him, and he must then make up his mind whether he will disclaim the lease or not. Sect. 24 is intended to limit the time within which the trustee must exercise his right to disclaim to twenty-eight days after the receipt of the notice, and if he lingers over the twenty-eight days he cannot disclaim at all under sect. 23, unless the Court has extended the time under the power given to it by sect. 24. The trustee then remains personally liable for the rent during the whole of the remainder of the lease, unless the landlord chooses to release him, as has been done in the present case. Sect. 24 confers no right on the trustee; it only limits the right given to him by sect. 23. If he does not follow the course prescribed by sect. 23 his liability remains as it was under the law which existed before the Act of 1869. And that is really the force of the decision in *Ex parte Davis* (1). Lord Justice *Mellish* says (2), "Neither the 23rd nor the 24th section, however, enacts anything as to what is to be the effect if the

(1) 3 Ch. D. 463. (2) 3 Ch. D. 474.

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Judgment, Brett, L.J.

trustee does not disclaim," *i.e.*, if he does not disclaim in the way pointed out by sect. 23. If he does not, neither sect. 23 nor sect. 24 enacts anything as to the trustee's liability, which is left as if those sections had not been passed, *i.e.*, he remains personally liable for the rent. This construction of the Act will not, I think, work any hardship. The landlord cannot force the trustee to disclaim except within the twenty-eight days, and the trustee is further protected by rule 28 of the Bankruptcy Rules, 1871, which provides that he is not to disclaim a lease without first obtaining the leave of the Court. He cannot, therefore, be made personally liable on the lease except upon fair and reasonable terms. A trustee ought to make up his mind speedily whether he will disclaim a lease or not.

Cotton, L.J.

COTTON, L.J.:—

I also am of opinion that the order of the Registrar cannot be sustained. Before I give my reasons for so thinking I must observe that we are not now deciding that without the submission of the parties we could entertain this appeal. I say this in order that it may not be assumed in any future case that without such a submission the Registrar would have had any jurisdiction to entertain the application to him, or that this Court would have had any jurisdiction to entertain the appeal.

Upon the evidence I think it is clear that the trustees were in possession of the property up to the 13th of April, and, that being so, it is not disputed that under the old law an assignee in bankruptcy would have been personally liable for the rent. Is there, then, anything in the Act of 1869 to relieve the trustee from this liability? Under sect. 23 he can entirely relieve himself by doing that which is pointed out by that section. Has that been done in the present case? I think not. The trustee sent the key of the premises to the landlord, and he accepted it, and that amounted by operation of law to a surrender of the lease as from that date. But can it be said to have been effectual under sect. 23? That section gives to the trustee a special statutory power, but it must be followed strictly. When certain specified things are done, then and then only can the specified result follow. It cannot be said in the present case that the trustees have any personal equity

as against the landlord. Sect. 24 gives the trustee no greater power than was given to him by sect. 23, but whereas the power given by sect. 23 was unlimited as to time, sect. 24 entitles the landlord to call upon the trustee to exercise the power within a limited time. In the present case, the power not having been exercised by the trustees in the mode prescribed, they remain liable for the rent as they would have been under the old law. Sect. 35 was relied upon to shew that they are only liable for a part of the quarter's rent proportioned to the time during which they were in possession. But, in my opinion, that section simply gives to the landlord a right of proof which he would otherwise not have had; it in no way relieves the trustees from the personal liability which would have attached to them under the old law for the whole quarter's rent.

Solicitor for Landlord: *H. W. Christmas.*
Solicitor for Trustees: *W. J. Foster.*

GILBERT *v.* ENDEAN.

[1875 G. 22.]

Evidence—Information and Belief—Interlocutory Application—Setting aside Compromise.

A decree was made by consent ordering the Defendant to give a bond for payment of a certain sum to the Plaintiff, and to deposit certain shares as security. Subsequently a compromise was come to by which the Plaintiff agreed to accept a smaller sum on the ground of the poverty of the Defendant. The Plaintiff afterwards moved to enforce the decree, notwithstanding the compromise, on the ground that he had been induced to enter into the compromise by misrepresentation. In support of this it was shewn that shortly before the compromise was signed the Defendant's father, who was believed by all parties to be a man of property and had refused to assist the Defendant, had died, which fact was known to the Defendant's solicitor when the compromise was agreed to but was not known to the Plaintiff's solicitor. The Plaintiff's solicitor deposed that as "he was informed and believed" the Defendant's father had died intestate, and the Defendant had become entitled to a share of his estate, more than sufficient to meet all his liabilities. At the interview when the compromise was agreed to, the Defendant's solicitor repeated the statement previously made as to the Defendant's father having

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refused to assist him. An order having been made by *Malins*, V.C., giving the Plaintiff leave to enforce the decree notwithstanding the compromise:—

Held, on appeal, that the question whether the compromise was invalid ought to have been made the subject of a new action, and ought not to have been tried on a motion of this nature; but that as the case had been argued on the merits in the Court below without this objection being insisted on, the objection could not be taken in the Court of Appeal; and the Court being of opinion that the order was right on the merits, it was affirmed.

Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it; but if in the Court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal.

11 Ch D 756
12 Ch D 565
13 Ch D 406
17 Ch D 316

Statement.

THIS was a suit to set aside a sale made to the Plaintiff by the Defendant, *Alfred Endean*, of certain shares in two mining companies, and to obtain a return of the money, on the ground that the Plaintiff had been induced to enter into the transaction by the misrepresentations of the Defendant.

On the 16th of July, 1877, when the case came on for trial, a compromise was effected and a decree taken by consent that the Defendant "do forthwith enter into a bond to pay on or before the 16th of August, 1877, to *Joseph Gilbert*, the amount of purchase-money for the *Llanawot* and *Bampfylde* shares in the pleadings mentioned, with interest at £5 per cent. per annum from the day of the purchase, and also £100 towards payment of the Plaintiff's costs of this cause; and do deposit with the Plaintiff £1000 of fully paid-up shares in the *Bodedris Mining Company* as security for the above terms;" and the order went on to direct that the bill should be dismissed as against the Defendant on those terms.

The amount thus made payable on the 16th of August, 1877, was £1363.

On the 26th of March, 1878, an agreement was signed by which the Plaintiff agreed to accept, and the Defendant to pay in discharge of the Defendant's liability under the above order, £500, payable by four instalments; the Plaintiff retaining the shares to which the suit related, and the payment of the last two instalments being guaranteed by the Defendant's solicitor; and in case of non-payment of any instalment, the Plaintiff's rights under the decree were to revive. This agreement was negotiated by Mr. *Greenip*, the Plaintiff's solicitor, and Mr. *Gregory*, the Defendant's solicitor.

When the first instalment of £125 fell due under this last agreement, Mr. *Gregory* took the amount to Mr. *Greenip*, who refused to receive it on the ground that the fact of the Defendant's father having died pending the negotiations had been concealed, and that the agreement was void as having been obtained by the suppression of a material fact.

The Plaintiff then moved that he might be at liberty to proceed against the Defendant under the order of the 16th of July, 1877, notwithstanding the subsequent agreement.

It was shewn that the negotiations for the agreement of the 26th of March were commenced by Mr. *Gregory* on the ground that the Defendant was almost penniless, and that his father, who was reputed to be a man of property, had refused to help him and would not help him. The terms were finally settled on the 25th of March. The Defendant's father had died on the 23rd, which fact was known to Mr. *Gregory* but not to Mr. *Greenip*. Mr. *Greenip*, by his affidavit in support of the motion, deposed as follows:—"Prior to the negotiations on the 25th of March, that is to say, on the 23rd of March, the Defendant's father, Mr. *J. P. Endean*, died suddenly, and, as I am informed and believe, intestate, leaving his widow and the said Defendant, his only child, him surviving, whereby the Defendant became entitled to a share of his father's estate, I believe largely in excess of the sum required to meet the Plaintiff's claim and his other liabilities in full. The fact that the Defendant's prospects and position had improved was, I believe, well known to the said Defendant and his solicitor at the time the latter called on me on the said 25th of March, and which fact, if it had been communicated to me, would have prevented my accepting anything less than the full sum due to the Plaintiff; but the excuse alleged by the Defendant's solicitor of the Defendant's ill health, and the desire of his friends therefore that the matter should be arranged, his remark that the Defendant's father would not assist him, and my belief in the Defendant's position as represented by his solicitor, induced me to accept the composition of £500 in settlement of the Plaintiff's claim."

There was not any evidence that the Defendant had succeeded to any property on the death of his father, nor that the father

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was a man of property, but it was admitted by the Defendant's counsel that all parties believed him to be so at the time of the negotiations.

Statement.

Mr. *Gregory*, in his affidavit, gave the following account of what passed on the 25th of March:—"I called at the Plaintiff's solicitors' office and saw the said Mr. *Greenip*, and after a preliminary reference to the negotiations between us I asked him what his terms for a settlement really were; and without any hesitation whatever he stated £500, payable as follows . . . and the Plaintiff to retain the shares. I stated, as the fact was, that Defendant had no security to offer, and whatever amount was paid would be with the help of friends, and that if security were insisted on a settlement would probably fall through. Ultimately, in further conversation, in which I stated (as I had on several occasions done before) that the Defendant's father had refused to help the Defendant, I inquired whether my undertaking that the two last instalments should be paid would be sufficient, and the said Mr. *Greenip* stated that he would be satisfied therewith." Mr. *Gregory* admitted that at the time of that interview he knew of the death of the Defendant's father, but went on to say: "At the time I called on the said *William Greenip* on the 25th of March, 1878, it was not, nor is it now, well known to me that the Defendant's position had improved by the death of his father, *J. P. Endean*, or that the said *J. P. Endean* had died intestate, or that the Defendant became entitled to a share of his estate largely in excess of the sum required to meet the Plaintiff's claim."

The motion was heard before Vice-Chancellor *Malins* on the 16th of May, 1878.

Argument.

Glasse, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

Our contention is that the Plaintiff was induced by misrepresentations made to his solicitor to agree to a reduction of the terms agreed upon for compromising the suit. If we had known that the Defendant's father had died, and he had not been in the penniless state he was represented to be, we should not have submitted to that reduction; we, therefore, ask that the original compromise entered into upon the trial of the action may be enforced. In *Prior* v. *Gribble* (1) the Court declined to enforce

(1) Law Rep. 10 Ch. 534.

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an agreement for compromise on motion in a suit, but that was on the ground that it comprised matters which were not the subject of the suit, and which could not have been made an order of the Court. In that case, however, Lord Justice *James* said that possibly under the new system of judicature the Court would have power to deal summarily with these things; and in *Eden* v. *Naish* (1) Vice-Chancellor *Hall* decided that under the *Judicature Act*, 1873, s. 24, sub-ss. 5, 7, the Court had jurisdiction upon summons to enforce an agreement made between the parties, and a case of *Hakes* v. *Hodgkins*, before the Master of the Rolls, was cited as an authority.

Higgins, Q.C., for the Defendant:—

Part of the compromise entered into at the hearing was, that the bill was to be dismissed. There is consequently no suit now pending between the Plaintiff and Defendant. The Plaintiff has got a decree in that suit, and he may enforce it as he may be advised, but the Court has no jurisdiction to make such an order as is now asked.

Glasse, in reply.

Judgment, V.-C. M.

MALINS, V.C.:—

This is a case of an extraordinary character, in which the Plaintiff instituted a suit against the Defendant to obtain a sum of money which he said he had been fraudulently induced to lay out in the purchase of shares in mines which were said to be in a very prosperous condition, when in fact they were not. When the case was before me I expressed a strong opinion against the conduct of the two Defendants, which I regarded as fraudulent. Before the case was heard out, however, the Defendants submitted to a decree in these terms: that the Defendant *Alfred Endean* was to enter into a bond to pay to the Plaintiff the amount of the purchase-money for the shares with interest at £5 per cent. per annum from the day of the purchase, and £100 for costs, and he was to deposit 1000 paid-up shares in another company as security for the fulfilment of these terms.

(1) 7 Ch. D. 781.

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After the decree, which was against the son, a correspondence took place, and upon a representation being made to the Plaintiff's solicitor that the Defendant, *Alfred Endean*, was penniless, and was quite unable to pay the claim against him, a compromise was effected, under which it was agreed that the Plaintiff should accept £500, which was to be paid by the Defendant by instalments. When the compromise was read to me, I was surprised to find the Plaintiff coming to enforce an order that was varied by consent, because the motion now before me is that the Plaintiff may be at liberty to proceed against the Defendant, *Alfred Endean*, under the order of April, 1877. But, considering that the parties entered into this compromise after the decree, I do not see how the Plaintiff could enforce the order without coming to the Court for that purpose. What the Plaintiff now says is, that he was induced to enter into this compromise upon the representations made to him by the Defendant, and it turns out now that at the time of the compromise the Defendant's father, *John Endean*, was dead.

It seems that the father left a wife and a son, the present Defendant, and died intestate. In that case, any real property which he left would go to the son, and two-thirds of any personal property would also go to him. The statement, which is not denied, is, that the Defendant's solicitor did know of the father's death at the time of the compromise, but the Plaintiff's solicitor did not, and no inquiry, therefore, was made about a will. The death of the father would no doubt have materially altered the position of affairs, and the Plaintiff would not, he says, have entered into this compromise if he had known it.

The question is whether, under such circumstances, the compromise ought to stand good.

In the case of *Scully* v. *Dundonald* (1) I stated my adherence to the rule that a compromise effected in a suit in this Court could be enforced by summary proceeding, but I did not think that I had power to enforce the compromise of an action in the Common Pleas. The Court of Appeal, however, made an order to enforce the compromise, the effect of which was, I am glad to say, to carry out the justice of the case.

(1) 8 Ch. D. 658.

The original decree in this suit, which was made by the consent of the parties, has been stopped by the Defendant taking advantage of the Plaintiff's ignorance of the facts, and therefore I will now accede to the motion and give the Plaintiff liberty to enforce the decree, notwithstanding the subsequent agreement for compromise.

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The Defendant appealed. The appeal was heard on the 26th of June.

C. A.

Higgins, Q.C., and *Whitehorne*, for the Appellant:—

Argument.

This is substantially a proceeding to set aside a compromise as obtained by fraud. The Court has no power to do so in this form of proceeding: it is a matter for an independent action. Much of the evidence is only given on information and belief, and it is a very serious matter to decide that parties have been guilty of fraud and misrepresentation on loose evidence of this kind.

Glasse, Q.C., and *Grosvenor Woods*, for the Plaintiff, were not called upon.

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

This is an appeal from an order of Vice-Chancellor *Malins*, which we have heard upon the merits, but there were objections taken as to the form of the order and as to the nature of the application and the evidence, some of which I think ought to have and would have succeeded had they been taken in the Court below.

The short statement of the case is this. The Plaintiff had obtained a judgment against the Defendant, *Alfred Endean*, ordering him to give a bond for payment of a sum of money on the ground of an alleged misrepresentation with respect to some mining shares. *Alfred Endean* did not pay, nor did he give the bond to secure the payment which was required by the judgment. Thereupon, the judgment itself being the result of an imparlance, there was a further imparlance, and a compromise was arrived at, the substance of which was that the Plaintiff was to take £500, and to take or keep some shares in settlement of his whole cause of action, and the two last instalments of the £500 were to be

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guaranteed by Mr. *Gregory*, the solicitor of the Defendant, *Alfred Endean*, and if the instalments were not duly paid the Plaintiff's rights were to revive.

The real question in dispute between the parties is whether that compromise ought to be set aside on the ground that it was obtained by misrepresentation or concealment of material facts. The mode adopted for bringing that question to trial was a motion to enforce the judgment. Now it happens accidentally, for I have no doubt it is an accident, that the judgment required a further motion to enforce it, because it fixed no date for the acts to be done. The one act is directed to be done "forthwith," and the other act is simply directed to be done without any reference to time. Therefore, technically, no doubt a motion for fixing a day was required, and until a day was fixed the order could not be enforced. Now, it appears to me that though that technicality would support the motion it would not have justified it, the object of the motion, as I said before, being, not to supply that technical defect, but to decide a substantial question between the parties, which, as it appears to me, should have formed the subject of a new action. However, that ground was not taken before the Vice-Chancellor, but the matter was fought out on the merits, and there being a technical ground on which the motion could be supported, it appears to me that it is now too late for the Appellant to take the objection that the motion ought not to have been heard.

Then we come to the question as to the evidence in support of the motion. Here I must say that in my opinion a charge of misrepresentation or concealment ought not to be supported by affidavits on information and belief. No doubt in the case of interlocutory applications the Court as a matter of necessity is compelled to act upon such evidence when not met by denial on the other side. In applications of that kind the Court must act upon such evidence, because no other evidence is obtainable at so short a notice, and intolerable mischief would ensue if the Court were not to do so. The object of these applications is either to keep matters as they are or to prevent the happening of serious or irremediable mischief, and for those purposes the Court has been in the habit of acting upon this imperfect evidence. But the

Court has no right to act upon it in finally adjudicating upon the rights of parties. This point was in fact decided long ago in the Court of Chancery, for although motions for decree were held to be motions for various purposes, it was decided that they were not motions for the purpose of evidence, because they were decisions on the ultimate rights of parties. Therefore, I must not be supposed to approve of what was done, but I think a Court of Appeal cannot refuse to decide on the merits where the parties in the Court below argued the case on the merits without objecting to the evidence. They must be taken to have assented to having their rights decided on the motion according to the usual rules governing interlocutory motions. If they wished them to be decided otherwise, they should have objected to the reception of the evidence. I think, therefore, it is impossible for the Appellant to succeed upon that ground, not having taken that course in the Court below.

Judgment, C. A. Jessel, M.R.

I now come to the merits of the question, and I am unable to dissent from the conclusion at which the Vice-Chancellor has arrived. The real question appears to be whether the death of the father was so obviously a material circumstance that the Defendant's solicitor ought to have communicated it to the other side. It appears to me that the fact was material, and ought to have been known by Mr. *Gregory* to have been material to be communicated, that it was not communicated, and that the compromise was allowed to be signed when Mr. *Gregory* knew, or ought to have known, that Mr. *Greenip* was ignorant of the fact of the death of the father; and it appears to me that the compromise cannot be supported, and that the Vice-Chancellor's conclusion is right in substance, and ought to be affirmed.

BRETT, L.J.:—

Brett, L.J.

The order appealed against is really founded upon a decision by the Vice-Chancellor that the compromise was obtained improperly, and so improperly, that those who wished to rely upon it could not enforce it. I am of opinion that, striking out everything which is only deposed to upon information and belief, and taking only the facts which were admitted on both sides, that decision was right.

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Judgment, C. A. Brett, L.J.

It seems to me that the ground upon which the Plaintiff was asked to enter into a compromise was that the son was absolutely without means, that his father had the means, but was refusing to assist him, and that therefore the only way in which the son could fulfil the compromise was by the assistance of other friends than the father. It seems to me that on the 25th of March, when this compromise was finally procured, that statement was in effect repeated. The grounds upon which the solicitor of the Plaintiff was asked to enter into the compromise were substantially the same, and the representation was continued by conduct, although not repeated in terms, that the son was without means because the father was still alive, and was still refusing to assist. It was brought to the mind of the Defendant's solicitor that that was the ground upon which the Plaintiff's solicitor would enter into negotiations, and probably come to a compromise. He knowing that, and knowing, therefore, the materiality of the fact of the father being dead, intentionally concealed that fact, knowing, or feeling perfectly convinced, that if he said that the father was then dead the other solicitor would immediately stop the negotiations. It seems to me that his concealment of that fact under those circumstances amounted virtually to an absolute misrepresentation of fact by which the contract was obtained. If that be so the compromise was a void contract, and the decision of the Vice-Chancellor was right in saying that it was so.

Cotton, L.J.

COTTON, L.J.:—

I agree in the opinion expressed by the other members of the Court, and I should add nothing but for the way under which the case comes before us. It comes before us on motion, but though it comes before us in that form, we have to decide the ultimate rights of the parties, and in my opinion, as regards evidence, it ought to be dealt with just in the same way as if a bill had been filed. I am not now adverting to the question as to whether or no the evidence ought to have been given *vivâ voce* or by affidavit, but to the question whether the rule that on interlocutory applications the Court may act upon evidence given on the witness's information and belief applies to the present case. But for the purpose of this rule those applications only are con-

sidered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, "You have in fact admitted this by not denying it, and therefore the Court may act upon the admission." But I must add this: where in the Court below the evidence not being strictly admissible, not being that upon which the Court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the Court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division. It lengthens the evidence, adds greatly to the expense, and has often caused a great deal of difficulty, both in the Court below and in the Court of Appeal, in ascertaining the real facts. In the present case, if one had to rely, for the purpose of affirming the decision of the Vice-Chancellor, upon anything which on these affidavits was merely stated on information and belief, I should

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have considerable difficulty in arriving at the conclusion that the order could be supported, unless I was quite satisfied that in the Court below it had been argued on the admission, or the practical admission, that the facts were as stated on information and belief. But an admission has been made that the father of the Appellant was or was reputed to be a man of property. There had been communications during the lifetime of the father, and representations had been made that the Defendant could not pay anything but by his friends' help. Then at the meeting on the 25th of March Mr. *Gregory*, the Defendant's solicitor, did know, and on the evidence I think we must take it that Mr. *Greenip*, the Plaintiff's solicitor, did not know, that the father was dead. As the father was a man of reputed means, the question of whether or no he was living at the time when this interview took place was a material circumstance, which would materially influence Mr. *Greenip*, for whether the father died testate or intestate, it would be at least a matter to be inquired into whether *Endean* had not acquired property from him. I therefore arrive at the conclusion that there is, according to Mr. *Gregory's* own statement, a concealment amounting to misrepresentation of facts as regards the father. I do not at all say that Mr. *Gregory* made an intentional and fraudulent misrepresentation, but still, in my opinion, he made what Mr. *Greenip* would naturally take as a representation that the father was still living. With whatever intention that representation was made, it was a misrepresentation of a fact material for Mr. *Greenip* to know, and I think that the Plaintiff is entitled to be relieved from the effect of a compromise obtained by such a misrepresentation.

Solicitors for Plaintiff: *Snell & Greenip.*
Solicitor for Defendant: *C. Gregory.*

Ex parte ISAACS. *In re* BAUM.

C. A. 1878 June 26.

Practice—Bankruptcy Appeal—Security for Costs—Increasing Amount of Deposit—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *ss.* 9, 16, 18—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Rules*, 1870, *r.* 145.

Notwithstanding rule 145 of the Bankruptcy Rules, 1870, the Court of Appeal can, under Order LVIII., rule 15, of the Rules of Court, 1875, require such security as it thinks fit to be given for the costs of a bankruptcy appeal.

Order made to increase the amount of the deposit on a bankruptcy appeal from £20 to £70, on the ground of the insolvency of the Appellant.

Statement.

THE trustee in the liquidation of *John Baum* had given notice of two appeals from two orders made by Mr. Registrar *Murray*, acting as Chief Judge, and had, on setting down each appeal, paid the ordinary deposit of £20.

Alexander Isaacs, one of the Respondents to both of the appeals, now applied to the Court of Appeal by original motion, that the trustee might be ordered to give security for the costs of each appeal exceeding the amount of £20, and that the proceedings on each appeal might be stayed until the security had been given.

In support of the application, evidence was given that the costs of the hearing before the Registrar would probably, on taxation, amount to £800; that the debtor had no estate applicable to the payment of those costs; that the trustee was in insolvent circumstances, and that the costs of each appeal would probably considerably exceed £100. This evidence was not contradicted.

Argument.

E. C. Willis, and *H. Reed*, for the applicant:—

Under rule 15 of Order LVIII. of the Rules of Court, 1875, the Court of Appeal has power to require security to be given for the costs of any appeal. This applies to bankruptcy appeals, and rule 145 of the Bankruptcy Rules, 1870, has thus been "expressly varied" so far as regards appeals to this Court: *Judicature Act*, 1875, s. 18. At any rate, this Court has a power to order security in addition to that required by the Bankruptcy Rule. The circumstances are such as to make it proper that further security for

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costs should be given, *Wilson* v. *Smith* (1), and £100 is a reasonable sum.

[JESSEL, M.R., referred to *Ex parte Viney* (2); *Ex parte Saffery* (3).]

Argument.

Rolland, for the trustee:—

Rule 145 of the Bankruptcy Rules, 1870, still remains in force with regard to appeals to this Court. It has not been "expressly varied" by rule 15 of Order LVIII. Therefore a larger deposit than £40 on each appeal could not be required. And after the ordinary deposit has been made it is too late to apply to increase it: *Ex parte Lovering* (4).

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The first question is whether the applicant is entitled to make an application to the Court of Appeal to increase the deposit. By the *Judicature Act*, 1875, s. 9, it is provided that the jurisdiction of the Court of Bankruptcy shall not be transferred to the High Court of Justice, but shall continue the same in all respects as if such transfer had not been made by the *Judicature Act*, 1873, subject to this exception, that the appeal from the *London* Court of Bankruptcy shall lie to the Court of Appeal in accordance with that Act. The 16th section of the Act of 1875 provides that the rules in the first schedule "as to all matters to which they extend shall regulate the proceedings in the High Court of Justice and Court of Appeal." Sect. 18 provides that all rules and orders of Court in force at the time of the commencement of the Act, in relation to appeals from the Chief Judge in Bankruptcy or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the rules in the first schedule, or by rules of Court made by Order in Council before the commencement of the Act, shall remain in force until altered or annulled by any rules of Court made after the commencement of the Act. Then turning to schedule 1, we find in Order LVIII., rule 15, "Such deposit or other security for the costs to be occa-

(1) 2 Ch. D. 67.
(2) 4 Ch. D. 794.
(3) 5 Ch. D. 365.
(4) Law Rep. 15 Eq. 291.

sioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." The only other rule to which we need refer is rule 145 of the Bankruptcy Rules, 1870. That rule provides that, "At or before the time of entering an appeal, the party intending to appeal shall deposit with the Registrar of Appeals such sum, not being less than £10 and not exceeding £40, as the Court appealed from shall direct, to satisfy, so far as the same may extend, any costs that the Appellant may be ordered to pay, and, in the absence of any such direction, the sum deposited shall be £20." We have then a positive statutory enactment that the rules in the schedule shall regulate the proceedings in the Court of Appeal, and we have an enactment that the Bankruptcy Rules shall remain in force except so far as they are expressly varied. Order LVIII., rule 15, and the 145th rule in Bankruptcy may well stand together. Rule 145 prevents the Court below from ordering a deposit of more than £40. Order LVIII., rule 15, empowers the Court of Appeal to direct what deposit it thinks right. This being an application for a deposit of £100, could not be made to the Court below, but only to the Court of Appeal. And the time at which it may be made is governed by the practice of this Court, under which it may be made after the appeal has been set down. We must, therefore, dispose of the case on the merits. There is no estate to be administered, and there is no probability that the Respondent, if successful, would ever get the costs of the appeal unless security were given for them. We think it fair, therefore, that the deposit on each appeal should be increased to £70.

BRETT, L.J.:— Brett, L.J.

The first question is whether this Court can entertain the application, and it is contended that rule 145 of the Bankruptcy Rules precludes its doing so. That rule existed at the passing of the *Judicature Act*, 1875, and it is urged that it is still in force because it has not been expressly varied, and in this I agree. It has been contended that Order LVIII., rule 15, does expressly vary it within the meaning of the 18th section of the Act of 1875, but I doubt this. The only variation which Order LVIII., rule 15, can be said to make in the bankruptcy rule is to add to it. There

C. A. 1878 *Ex parte* Isaacs. *In re* Baum. Judgment, Brett, L.J.

must still be a deposit made on entering the appeal, and the Bankruptcy Court cannot order it to be more than £40, but the Judicature rule provides that, if special circumstances require it, the Court of Appeal may order a larger deposit. This Court, therefore, has power to entertain the application, and looking at the extreme poverty of the Appellant, which has always been considered a special circumstance, I agree in the proposed order for increasing the deposit on each appeal to £70.

Cotton, L.J.

COTTON, L.J.:—

My view is that rule 145 of the Bankruptcy Rules remains in force, but that Order LVIII., rule 15, gives the Court of Appeal an additional power of dealing with the costs of appeals. The power of the Court of Bankruptcy is limited by rule 145, which deals only with the party while entering the appeal and before he has come to this Court. After the appeal has been entered, Order LVIII., rule 15, applies, and gives the Court of Appeal power to deal with security for costs. It is a new rule giving power to this Court, and is in no way inconsistent with the 145th of the Bankruptcy Rules, which limits the power of the Court of Bankruptcy. I am of opinion, therefore, that we can entertain the application, and under the special circumstances of the case I agree in the order suggested by the Master of the Rolls.

Solicitor for Applicant: *W. H. Roberts.*
Solicitors for Trustee: *Evans & Eagles.*

ANGLO-ITALIAN BANK *v.* DAVIES.

C. A.
1878
V.-C. H.
June 7.
C. A.
June 26;
July 1.

[1878 A. 76.]

Judgment Creditor—Receiver—27 & 28 *Vict. c.* 112, *s.* 1—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Rules of Court, Order* XLII., *rr.* 1, 23.

A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an elegit against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the Court might direct, and asking for a receiver. The Plaintiff then moved for a receiver in the new action.

Held, by *Hall*, V.C., and by the Court of Appeal, that the statute 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before the statute 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the Plaintiff was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.

Whether the appointment of a receiver could have been obtained in the old action, *quære*.

Discussion of the powers given to the Court of appointing receivers by *Judicature Act*, 1873, s. 25, sub-s. 8.

Statement.

ON the 8th of January, 1878, the Plaintiffs recovered against the Defendant judgment in the Chancery Division in an action of the same name [1877. A. 118] for £87,591 and costs. The Defendant was entitled to real and personal estate. The Plaintiffs recovered a small sum under a *fi. fa.*, a return of no further goods being made, and took out writs of elegit against the Defendant's real estate. But it turned out that it was subject to legal mortgages and could not be given in execution by the sheriff. No return was made to the writs of elegit. The Plaintiffs thereupon commenced this action, claiming to have it declared that under and by virtue of their judgment they were entitled to a charge upon all and every the lands, tenements, and hereditaments whereof the Defendant was seised, possessed, or entitled for any estate or interest in equity or at law, whether in possession, reversion, remainder, or expectancy, and in particular upon his estate and interest in certain hereditaments mentioned in the writ; to

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have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the Court might direct; and for a receiver and injunction; and the Plaintiffs claimed discovery from the Defendant as to the several matters aforesaid, and generally in aid of the writs of elegit issued by them upon their said judgment.

Statement.

The Plaintiffs then moved before Vice-Chancellor *Hall* that a receiver might be appointed of the rents, profits, surplus or other proceeds of sale, and all other moneys, if any, whereunto the Defendant then was or might be entitled, or which might be, or but for the order to be made on the motion, might be payable to the Defendant or any person or persons on his behalf arising from or in anywise in respect of certain specified estates, and any other lands, tenements, or hereditaments in the City of *London* and the counties of *Middlesex* and *Sussex*, or any estate or interest of the Defendant, whether at law or in equity, in the hereditaments thereinbefore particularly mentioned, and any such other lands, tenements, or hereditaments as aforesaid, with all necessary and proper directions in that behalf; with the usual directions for the delivery of deeds to the receiver, and an injunction to restrain the Defendant from receiving such rents, profits, and moneys.

The motion was heard before Vice-Chancellor *Hall* on the 7th of June, 1878, and was supported by evidence that the Defendant was selling various parts of his real estates.

Argument.

Dickinson, Q.C., and *Ingle Joyce*, for the motion.

Hastings, Q.C., and *Romer*, *contrà*.

The arguments before the Vice-Chancellor were the same as the arguments before the Court of Appeal, which are given below; and in addition to the authorities cited to the Court of Appeal the cases of *Wells* v. *Kilpin* (1) and *Beckett* v. *Buckley* (2) were referred to.

Judgment, V.-C. H.

HALL, V.C.:—

The question in this case is one which, I think, has never been decided, excepting so far as it was decided in *Tillett* v. *Pearson* (3).

(1) Law Rep. 18 Eq. 298. (2) Law Rep. 17 Eq. 435.
(3) 43 L. J. (Ch.) 93.

The decision in that case appears to be applicable to the present case, but not to have been a decision upon argument.

Considering the case independently of that decision, I will endeavour to state what I consider to be the correct conclusion. I should have wished to be able to give the case more consideration, but from its nature I think it incumbent upon me to dispose of the matter now.

The argument is presented thus on behalf of the applicant. He says: "Apart from the two statutes, 1 & 2 Vict. c. 110, and 27 & 28 Vict. c. 112, I should have had, under the circumstances of this case, a right to come to the Court to have relief by the appointment of a receiver over these particular properties which belonged to the debtor, subject to the rights of any prior incumbrance, so as to protect the property in order that it might be made available for my judgment." The applicant then contends that the right has not been interfered with or taken away by either of those statutes.

As regards the first statute, there is nothing in it which it can be contended takes away the right. That statute gives enlarged rights to the judgment creditor, making the whole of the interest of the debtor, and not merely a moiety of it (which was the Common Law right), liable under an elegit, and it gives him a general charge over other properties than those which were available for the benefit of judgment creditors before the Act.

The Act 27 & 28 Vict. c. 112, is the one which it is most important to consider in this case, and its first section is relied on in answer to this application. That section is, "No judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance." It is said that the Plaintiff in this action is by force of that section not entitled to come to the Court for a receiver until after such time as he shall by means of a decree or order in this action have been declared to have a lien on the land under his judgment. It appears to me that this is not a sound view. In *Hatton* v. *Haywood* (1), the question was whether

(1) Law Rep. 9 Ch. 229.

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a judgment, in respect of which there was no delivery in execution "by virtue of a writ of elegit or other lawful authority," could prevail over a bankruptcy. Before there had been a delivery in execution, the whole of the bankrupt's property passed to the trustee under the bankruptcy, subject only to such judgments as at the time of the bankruptcy were effectual as against bankruptcy. Judgments against real and personal estate were intended by the Act to be placed on the same footing, and if the judgment in any given case would not have been effectual as against personalty, it was not intended that it should be effectual against realty. Therefore, when you come to apply sect. 1 to the case, as the law with respect to real estate is to be assimilated to that relating to personal estate, the result is, that there being no execution there is no lien, and the property must pass to the trustee free from the judgment. The main purpose and object of the Act was to facilitate the transfer of land by rendering it unnecessary to make searches for judgments on the purchase of land, and the law was altered step by step with a view to giving purchasers a good title as against judgments. But I see no reason, founded on the policy of the Act, why the law should be changed in a case like that now before the Court. If under the old law the creditor would have been entitled to come to the Court and say, "I have a judgment which I cannot enforce because there is a legal impediment, let me enforce it through the equitable jurisdiction of the Court," I see no reason why the Court should refuse to give the creditor all the advantages which he would have had, independently of the Acts, subject of course to any rights which third parties might have acquired by alienation or bankruptcy, or otherwise.

When we read the judgments in that case, I think the learned Judges held that if you get a receiver the provisions of the Act are complied with, for that you get a delivery of the land in execution by virtue of "other lawful authority." This is exactly what the applicant has come for. He has come for a receiver, so that he may be in possession by lawful authority, and Lord *Selborne* in his judgment refers to *Thornton* v. *Finch* (1), as shewing that, although the land was not specifically bound until taken

(1) 4 Giff. 515.

in execution, yet the inchoate right under 1 & 2 Vict. c. 110 might be made the foundation of a suit in equity to remove the legal difficulty in the way of making a perfect charge. Therefore it appears to me that there is nothing whatever in that judgment hostile to the application which is made in the present case. C. A. 1878 ANGLO-ITALIAN BANK v. DAVIES.

Then, if the difficulty upon the statute does not exist, as I think it does not, is the applicant entitled, under the practice of the Court, to make this motion under existing circumstances? Considering the nature of the property which the motion seeks to make applicable—a property which, if it remains in the hands of the debtor may, by means of a sale or disposition, be rendered unavailable for the purpose of the execution—a property which, in the view of this Court must be considered liable to equitable execution, this appears to me a proper case for the exercise of the jurisdiction. I do not consider that any of the cases referred to are hostile to this conclusion. The decision of Vice-Chancellor *Wood* in *In re Cowbridge Railway Company* (1) certainly is not, for his view was that it was not intended by the second Act to take away the rights which existed under 1 & 2 Vict. c. 110. The observations of Lord Justice *Giffard* in *Guest* v. *Cowbridge Railway Company* (2) do not appear to me to be adverse to my view, but in fact to support it. Judgment. V.-C. H.

It appears to me, therefore, that an order ought to be made for a receiver according to the terms of the notice of motion.

The Defendant appealed. The appeal came on to be heard on the 26th of June. C. A.

Hastings, Q.C., and *Romer*, for the Appellant:— Argument.

Our case is, that until the land has been delivered in execution, or an order made declaring the judgment creditor to have a charge on it, he, by virtue of 27 & 28 Vict. c. 112, s. 1, has no interest in the land and cannot apply for a receiver. The right to a receiver depends on the Plaintiffs having a charge, and the statute says that till certain things have been done the judgment shall not affect the land. *Hatton* v. *Haywood* (3) decides that a judgment

(1) Law Rep. 5 Eq. 413. (2) Law Rep. 6 Eq. 619.
(3) Law Rep. 9 Ch. 229.

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creditor to whom the land has not been delivered in execution has no charge as against a trustee in bankruptcy. We do not dispute that at the hearing the Plaintiffs might get a declaration that they were entitled to a charge, and then obtain a receiver. *Wells* v. *Kilpin* (1) bears out the view that there is no present charge.

[JESSEL, M.R.:—In that case equitable execution was granted by the appointment of a receiver.]

Yes, but at the hearing.

[JESSEL, M.R.:—The question is, whether it may not be obtained before the hearing.]

Then we say that the receiver cannot be obtained on interlocutory application in this action, because that is giving on motion the whole relief to be obtained in the action.

[JESSEL, M.R.:—In a proper case why may it not be given before the hearing?]

It would be inconsistent with 1 & 2 Vict. c. 110, s. 13, which provides that relief is not to be obtained within the year.

[JESSEL, M.R.:—Does that apply to any relief except the enforcing the equitable charge created by that statute?]

Here is a judgment which at present does not affect the land: how can bringing an action give a right to appoint a receiver on motion? the commencing the action cannot make the judgment affect the land. In *Tillett* v. *Pearson* (2) it was held that a judgment creditor who had sued out an elegit and got a return from the sheriff might file a bill for a receiver. The Vice-Chancellor considered that the only case bearing on the present, and it is distinguishable, for here there has not been a return. The property, moreover, was a wasting property, and the case was not argued. The return to the writ brought the case within the words of the 1st section.

[JESSEL, M.R.:—The ground on which I went in that case was that it was giving equitable execution.]

The *Judicature Act*, 1873, s. 25, sub-s. 8, does not warrant the giving the whole relief sought in the action on an interlocutory application.

(1) Law Rep. 18 Eq. 298.

(2) 43 L. J. (Ch.) 93.

[JESSEL, M.R.:—I do not agree with that view; but it appears to me a question whether it was necessary that there should be a fresh action, and whether the receiver might not have been appointed in the original action.

Dickinson, Q.C.:—The Vice-Chancellor, on his attention being directed to *In re Cowbridge Railway Company* (1) and *Guest* v. *Cowbridge Railway Company* (2), had intimated that a fresh action would be necessary.]

Assuming that the relief sought at the hearing can be granted now, the Court will not enforce the judgment within the year: *Smith* v. *Hurst* (3); though it can interfere to protect the property: *Partridge* v. *Foster* (4); *Watts* v. *Jefferyes* (5). We say that even if the Plaintiff is entitled the new action is an improper one, for that the relief could have been obtained in the old one.

[JESSEL, M.R.:—Can that be anything more than a question of costs? *Clutton* v. *Lee* (6).]

If a new action is wanted, the relief should be obtained at the trial. A motion ought to be in the original action, not in the new one.

Dickinson, Q.C., and *Ingle Joyce*, *contrà*:—

Our case does not depend on the statutory charge, but on the general right of a judgment creditor: *Mitford* on Pleading (7); *Curling* v. *Marquis Townshend* (8); *Lord Dillon* v. *Plaskett* (9); *Neate* v. *Duke of Marlborough* (10). In *Smith* v. *Hurst*, an elegit not having been issued, the Court could not interfere under the old law, so the case turned on the 1 & 2 Vict. c. 110. The case is a clear one for equitable relief; there are impediments to the judgment being enforced at law. Then, can it be done on interlocutory application? *Smith* v. *Hurst* is an authority that it can, for a receiver was there granted on motion as to the chattels. *Hatton* v. *Haywood* (11) does not affect us. The Plaintiff there could only

(1) Law Rep. 5 Eq. 413.
(2) Ibid. 6 Eq. 619.
(3) 1 Coll. 705.
(4) 34 Beav. 1.
(5) 3 Mac. & G. 372.
(6) 7 Ch. D. 541.
(7) Page 126.
(8) 19 Ves. 628, 632.
(9) 2 Bli. (N.S.) 239.
(10) 3 My. & Cr. 407.
(11) Law Rep. 9 Ch. 229.

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succeed by shewing that he had an interest in the land at the time of the bankruptcy, at which time possession had not been given. The statute 27 & 28 Vict. c. 112, has not taken away the old right to come into equity to have possession delivered.

Hastings, in reply.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from the decision of Vice-Chancellor *Hall*, and it raises an important question, which has been argued at very great length, and which I lament to have been capable of argument. There is an unsatisfied and undisputed judgment against the Defendant for many thousand pounds. The Defendant is in possession of freehold land in fee simple of which he is receiving the rents. That land happens to be subject to a mortgage, and, the legal estate being outstanding in the mortgagee, the judgment creditor cannot obtain possession of it under the ordinary writ of elegit. It is gravely urged that, notwithstanding the Act of Parliament which applies equitable rules to all matters, the owner of the land can by reason of the outstanding mortgage, remain in possession and receive the rents in defiance of the judgment creditor until the trial of the action, if indeed the argument does not go the length of saying that the judgment creditor has no remedy. I lament, I say, that it was possible to argue such a case, and it is only possible, because the words of the statute 27 & 28 Vict. c. 112, are such as do not fit in with the preamble of the Act or with the ordinary knowledge of judgment law possessed by those acquainted with the subject. The Act was no doubt passed for a very useful purpose, but I think I can safely say it never could have been in the contemplation of the framers that it should be sought to be made use of for such a purpose as this. However, we must deal with the Act as we find it. It says (sect. 1): "No judgment, statute, or recognisance to be entered up after the passing of this Act, shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance."

The first question that arose after the passing of the Act was

what was the meaning of "actually delivered in execution." Everybody knew what "delivered in execution" meant, but "actually delivered in execution" was not so easy to understand. It was decided that it meant the same thing as "delivered in execution," and therefore that difficulty vanished.

The next question was what was the meaning of "other lawful authority." Those words became the subject of judicial decision, and, as I understand the result of that decision, it was this: that the words referred to the order of a Court having authority to give that which amounted to delivery in execution, although not technically a delivery in execution, in other words, to what was commonly called equitable execution, which was putting the land in the possession of a receiver. That was decided by the full Court of Appeal in *Hatton* v. *Haywood* (1).

Then the next question is, how this equitable execution is to be obtained? I will take the two periods, those before and after the passing of the *Judicature Act*. Before the passing of the *Judicature Act* the mode of obtaining equitable execution was by issuing a writ of elegit, and, without obtaining a return, to file a bill in equity alleging that the Plaintiff had issued his writ of elegit, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a receiver. According to the practice the application for the receiver was made by interlocutory application before the hearing, and in a proper case it was granted. Now, I am not aware that it was ever decided that it should be refused because the Defendant was owner in fee simple. It ought to be granted in every proper case.

In dealing with such an application the first point to be considered was whether there was an undisputed judgment. In this case it is quite clear that there is. The next point was: Has the Defendant got the land? because he might say, "Do not appoint a receiver of somebody else's land; I am not in possession; I have nothing to do with it." Here there is no dispute about that. When those two points were answered the third point was: "Is the interest of the debtor in the land such that it cannot be reached at law?" If that was answered in the affirmative, as it must be in the case of an equity of redemption (for the *Statute of*

(1) Law Rep. 9 Ch. 229.

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Westminster was extended by the *Statute of Frauds* only to the case of pure equities, that is, where there was a bare trust and not an estate like an equity of redemption),—if that was answered in the affirmative it seems to me that the order should be of course. It does not appear to have been necessary to consider any such question as whether the debtor's interest was a life estate or an estate for years or a wasting property. The creditor wanted his money, and it would have made a great difference to him whether he got it then or five or ten years later, after the case had come to a hearing. In former days the market value of a fee simple in possession and of a fee simple in reversion after the trial of a Chancery suit would have been very different. Besides that, it must be remembered that now the liability to become bankrupt is universal. In former days most landed proprietors were not subject to the bankruptcy laws, but that is not so now; and it was decided in *Hatton* v. *Haywood* (1), that the title of the trustee in bankruptcy overrides that of the judgment creditor who has not got his execution. It appears to me, therefore, there is no ground for saying that where all the circumstances I have mentioned concurred a Court of Equity would not have granted a receiver before the *Judicature Act* upon an interlocutory application.

I may mention that every case on the subject with which I am acquainted was a case in which the application was made upon interlocutory motion before the hearing. It was so in the well-known decision of *Lord Dillon* v. *Plaskett* (2); and Lord *Eldon*, in giving judgment, does not refer to the fact which was mentioned, not in the bill, but only incidentally in the course of the argument, that Lord *Dillon* had only a life interest.

11 C.L.D. 693.

The origin of the right which is established by all the authorities is shewn clearly by *Neate* v. *Duke of Marlborough* (3). The judgment creditor had no interest in the estate itself, he only had the potentiality of acquiring one. The elegit was, as its name imports, only an option to take the lands. The judgment creditor might issue a *fieri facias* by which he could get the goods, or an elegit, by which he could get both the land and the goods—originally only half the land, but afterwards, by the statute 1 & 2 Vict.

(1) Law Rep. 9 Ch. 229. (2) 2 Bli. (N.S.) 239.
(3) 3 My. & Cr. 407.

c. 110, the entirety. It was held in equity—why I do not understand—that the only way of intimating his desire to exercise his option was by issuing the writ of elegit. It was argued very strenuously in *Neate* v. *Duke of Marlborough* (1) that a man might say, I exercise my option by telling you I want the land, and I cannot get it at law; why go through the form of issuing an elegit which can result in nothing? However, Lord *Cottenham*, in *Neate* v. *Duke of Marlborough*, felt bound by the prior authorities, and decided that that useless and absurd form by which the creditor could not get the estate, must be followed, and that the bill failed for not having alleged it. Still the substance of the case was that the judgment creditor had exercised his option to take the Defendant's land, and that he could not get at it because the Defendant's interest was of an equitable nature, which could not be reached except by the assistance of the Court of Equity, and when he shewed that he had properly exercised his option, and was in the position of a man who would have got the land at law if the estate had been legal, he was entitled to the assistance of the Court of Equity by interlocutory application if the estate was equitable.

Now, if that were so, undoubtedly this action and order would have been right before the passing of the *Judicature Act*, unless we are prepared to hold that this is not a delivery in execution. As I have said before, it is always called equitable execution; it was so called so long ago as the time of Lord *Thurlow*, by Lord *Thurlow* himself, and I am at a loss to know what is meant by "other lawful authority," unless it be the order of a Court of Equity which gives equitable execution. I think, therefore, that the order under appeal is a delivery in equitable execution; and even supposing it were not, I still think the order could, prior to the *Judicature Act*, and after the passing of the Act of the 27 & 28 Vict. c. 112, have been maintained. It is quite true the Act says the land shall not be affected until it is actually delivered in execution, but the province of the Court on interlocutory application was to see that the property did not disappear between the time of making the application and the time of the trial. If the Plaintiff had a right to have equitable execution, his right existed at

(1) 3 My. & Cr. 407.

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the time of filing the bill. That right was established, no doubt, at the trial or hearing of the cause, but what was established was his original right, and it is the province of a Court of Equity to keep the property ready for him when the time of establishing his right arrives. It might happen, especially in property of a wasting nature, that nothing might be left at the time of the trial, if the debtor was allowed to continue in possession, and it is the duty of the Court to protect the property in the meantime, or, in other words, there is no equity in the Defendant to avail himself of the delay, which is a necessary incident of all judicial systems, and I think that the order might have been upheld on that ground, though I prefer the former one.

Now, what has the *Judicature Act* done? In the first place I think that the Act of 1873, sect. 25, sub-sect. 8, has enlarged very much the powers which Courts of Equity formerly possessed of granting injunctions or receivers. The words are: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just." Then it goes on: "If an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass," it may be granted whether or not certain things have occurred which prior to the passing of the Act would in one alternative have prevented the Court from granting an injunction or receiver.

The first point to be considered on that sub-section is, whether it applies to the case of granting an injunction or receiver after the judgment as well as before. I have no doubt that it applies to both. One reason for saying so is, that the words of the section are general. Considering that injunctions and receivers are asked for after judgment as well as before, and were so asked for at the time of the passing of the Act, I see no reason for cutting down the general words of this section to make it apply merely to applications before the trial of the action. In the next place we have the words (no doubt limited to waste and trespass), "If an injunction is asked either before or at or after the hearing."

There a case after hearing is evidently dealt with. Another reason is, that the Act transfers the existing jurisdictions, it does not alter them until we come to sect. 24. When we come to look at what the jurisdiction of the Common Law Courts was under the the *Common Law Procedure Act* of 1854, we shall see at once that an injunction could be granted either before or after judgment. The 79th section of that Act gives the party injured a right to claim a writ of injunction against the repetition or continuance of such wrongful act, and then the 82nd section says this: "It shall be lawful for the Plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the Defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the Court, or, when such Courts shall not be sitting, by a Judge." Now it is impossible to suppose that if you might apply *ex parte* after judgment you might not apply upon notice. It is a case of *omne majus in se continet minus.* When an injunction might be applied for either before or after judgment, it appears to me impossible to limit the effect of the 8th sub-section to a case of applying before judgment. It seems to me, therefore, that there is a larger discretion given by the 8th sub-section to the Judges as to when they shall grant an application than they had before. Of course, like every new power, it must be exercised for judicial reasons; but the existence of such power gets rid, as it appears to me, of any decisions, if such decisions there be, limiting the exercise of the discretion as regards the exercising it on an interlocutory application as distinguished from a trial at law.

If that is so, what is the meaning of Order XLII., rule 1? Three of the Courts, the jurisdiction of which was transferred, were the Courts of Common Law at *Westminster.* Their orders and judgments might have been enforced by the Equity Court, and it

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does not appear to me to be impossible or difficult to read the words of that rule as including such enforcement by an Equity Court. It is not absolutely necessary to decide that point, because the 23rd rule says, "Nothing in any of the rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever." Therefore, if the right is not expressly conferred by the 1st rule, it is certainly, as it appears to me, preserved by the 23rd rule. In either way, therefore, the right remains.

There is only one further point to be considered. If the right remains, how is it to be exercised? Can it be exercised by motion in the action itself, or is it necessary to institute a new action? If I were driven to express an opinion upon that point I should probably prefer the shorter and cheaper process. But I do not intend finally to decide it, because it is not necessary to do so. Even assuming it were open to the Plaintiffs in the action to proceed by motion, still the right to proceed by action is not taken away, the 23rd rule is express, and therefore they may proceed by action. If it were clear beyond all question that they ought to proceed in the old action, that might affect the costs of the new action. That point has not been sufficiently discussed for me now to deliver a final opinion upon it, and therefore I prefer saying that the new action is certainly warranted and ought to be entertained.

Under these circumstances it appears to me that the order made by the Vice-Chancellor is right, and that the appeal must be dismissed.

Brett, L.J.

BRETT, L.J.:—

This order is made in an action brought in the Chancery Division, and which before the *Judicature Act* could only have been brought in the Court of Chancery. The first question, therefore, seems to me to be whether before the *Judicature Act* this order could have been made at the present stage of such a suit, and I am satisfied that it could. It seems to me that the only conditions necessary to give the Court jurisdiction were that there should have been a judgment obtained in a Court of Common

Law, that a writ of elegit should have issued, and that the interest in the real property of the judgment debtor should be an equitable interest such as could not be taken in execution at law. The moment those conditions were fulfilled I think it is made out the Court of Equity had jurisdiction to make such an order. It seems to me that Mr. *Dickinson* has made out that such an order might have been made and would have been made before the *Judicature Act*, upon those conditions, and those only, being fulfilled, and therefore that this order could have been made before the *Judicature Act*. I do not think the Act of 27 & 28 Vict. c. 112, has prevented the Court of Equity exercising that jurisdiction. It is true that the statute says that no judgment shall affect the land until it is actually delivered in execution. It seems to me that the argument founded on this enactment is based upon phrases which have been used with regard to a judgment or the writ of elegit having charged lands or having given a general lien upon lands. I cannot help thinking that the best phrase was that judgments gave "a sort of general lien." It is difficult to say what the meaning of the term "general lien" here is in this case. It is a term used at law, but the difference there is between a particular lien and a general lien. A particular lien is given upon goods in respect of work done upon those goods, a general lien is given in respect of work which may have been done upon other goods; but if we speak of a judgment giving a general lien upon land, this can only mean that it has something like the same effect upon land that a claim of general lien has upon goods. We may disregard that phrase, for it was not necessary to say that the judgment affected the land, or charged the land, or that the writ of elegit charged the land before the writ of elegit was executed. This jurisdiction was exercised, although before the passing of 27 & 28 Vict. c. 112, it might be said that neither the judgment nor writ charged the land or affected the land at all, and that statute which was passed for another purpose does not affect the jurisdiction.

On this view it seems to me unnecessary to determine in the present case what is the effect of appointing a receiver at this stage of the cause as regards the provisions of the 27 & 28 Vict. c. 112. It is not necessary to determine whether appointing a

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receiver at this stage is within the meaning of that Act an actual delivery in execution or not, because, as it seems to me, this jurisdiction can be exercised although neither the judgment nor the writ of elegit can be said to affect the lands at all. I decline, therefore, to give an opinion as to what is the effect of the order for a receiver with regard to the application of that Act.

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It further seems to me that upon this view it is unnecessary to determine what is the proper construction of the *Judicature Act*, as this case can, in my opinion, be decided without any reference to that Act. The question has been raised whether, under the Act of 1873, sect. 25, sub-sect. 8, a receiver might not be appointed in the original suit in this case, and as to the time at which, and the circumstances under which, a receiver may be appointed by a Common Law Division in an ordinary action. Those points seem to me to be of the highest practical importance, and as at present advised I decline to give any opinion upon them.

Cotton, L.J.

COTTON, L.J.:—

I am of opinion that the order of the Vice-Chancellor *Hall* is right. I think that much of the argument has proceeded from a want of due consideration of what the Plaintiffs were really asking the Court to do in this case. What the Plaintiffs were asking was something for which Plaintiffs came to the Court of Chancery long before the Act of 1 & 2 Vict. c. 110. They were not asking the Court to enforce a charge. When a person had before that Act obtained a judgment the natural course was to take the ordinary legal process by writ of elegit; but there might be difficulties which prevented him from getting the land delivered in execution under the elegit, and when that was so he came into a Court of Equity on the well-known principle that a Court of Equity would give relief where a legal right existed, and there were legal difficulties which prevented the party from enforcing that right at law. That being so, it was a well-known form of suit before the Act of 1 & 2 Vict. c. 110, that a Plaintiff having a judgment which, owing to legal impediments, could not be enforced at law, came into equity, not for the purpose of enforcing such a right by way of charge as is given by the Act of 1 & 2 Vict. c. 110, but to have what is

called equitable execution; that is to say, to have the lands delivered in execution to him in equity when he would have got them at law in the ordinary process but for certain difficulties existing. The leading case on the subject is *Neate* v. *Duke of Marlborough* (1), where the distinction is well pointed out by Lord *Cottenham* in giving judgment. He says (2) that "the jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment." Then he says (3), "The effect of the proceeding under the writ is to give to the creditor a legal title which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this Court, not to obtain a greater benefit than the law, that is, the Act of Parliament, has given him, but to have the same benefit by the process of this Court, which he would have had at law, if no legal impediment had intervened."

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Now the ordinary way by which that relief was given was by granting a receiver, and I take it to be indisputable that in a case like *Neate* v. *Duke of Marlborough* the Court did, on interlocutory application before the hearing, grant a receiver if it thought that under the circumstances it was right to prevent the Defendant from remaining until the hearing of the cause in possession of the property, of which, but for the legal impediment which forced the Plaintiff to come into equity, the Plaintiff would have had execution by the ordinary process.

I think it unnecessary to go through the cases. Cases have been referred to where with reference to an entirely different question, that of enforcing the equitable charge created by 1 & 2 Vict., and which could not be enforced for a year, the Court interfered within the year, grounding its interference on the fact of the subject-matter of the charge being a wasting property. If those cases have any application to the present, they assume that the Court had jurisdiction to interfere before the hearing, and only refer to the case of the wasting interest for the purpose of shewing that it was desirable to exercise that power which the Court had; for the mere fact that the property was wasting, and would probably be gone before the hearing of the cause, could not give the

(1) 3 My. & Cr. 407. (2) 3 My. & Cr. 416.
(3) 3 My. & Cr. 417.

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Court jurisdiction to interfere before the hearing. If the Court had jurisdiction, the wasting nature of the property was a very good reason for interfering; but if it had no jurisdiction, it could not interfere because it would be very desirable to do so.

Thus the cases stand before the Act 27 & 28 Vict. c. 112, and the only question is as to the effect of that statute. The first section says: "No judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority." It has been decided that the appointment of a receiver will be actual delivery in execution by lawful authority, and that at the hearing a receiver may properly be granted in order to give delivery by lawful authority. But it is said that this cannot be done on interlocutory motion. I cannot accede to that. Before the Act was passed it was the practice of the Court to interfere by interlocutory motion to grant a receiver. Why should it not do so now? The case of the Plaintiff is this: "I was forced to come into equity because there were legal impediments to prevent my obtaining by ordinary legal process a right which existed at the time when I filed and before I filed the bill, that is, a right to have this land delivered in execution." That being so, why is he not to have that which, independently of the Act, was the relief ordinarily granted if it was a proper case. As the Plaintiff had the right at the time when he filed his bill to have delivery in execution if there had been no legal impediment, the Court of Equity ought not, in my opinion, to hesitate, if the circumstances justify it, in at once, on the filing of the bill, acting according to its usual practice, and interposing on interlocutory motion, even if that is to have the effect of giving the Plaintiff delivery by lawful authority, as in my opinion it has. But even if it has not, it seems to me equally clear that a Court of Equity ought not to hesitate to act on its own practice, and then the effect would be this, that the Court interposes because the Plaintiff says, "I had a legal right at the time of the filing of the bill, which legal impediments prevented me from exercising. Do not let the delay which must necessarily ensue before the case can be decided leave the Defendant wrongfully in possession of the property, dealing

with it as he thinks fit. If you cannot give me the right to the property at once, keep it *in medio* until you can decide the right."

My opinion is, that the appointment of a receiver is now delivery of execution by lawful authority within the meaning of the Act of 27 & 28 Vict. c. 112, and that there is nothing whatever to prevent the Court from interposing on interlocutory motion. If there were any formal difficulty, in my opinion the *Judicature Act*, 1873, s. 25, sub-s. 8, removes it. Under that sub-section the Court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that section where a Plaintiff has himself the power of obtaining possession at law.

There is another point which has been raised, namely, whether or no this relief could have been obtained in the old action. Now the only way in which that arises here is—Can it be said that the relief is so clearly obtainable in the old action as to make this application and this suit improper? Even if this relief could have been obtained in the old action, that would not make this suit an improper suit, because there was the right antecedently to institute such a suit as this, and that, as has been pointed out by the Master of the Rolls, is not in any way taken away. But I give no opinion whatever on Order XLII., or whether under that Order the Plaintiff can obtain a receiver as a means of enforcing a mere money order or money judgment which he has obtained in the action.

Solicitors: *G. M. Clements; Darley & Cumberland.*

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1878

V.-C. H.

July 2.

C. A.

July 6, 9.

DOWDESWELL *v.* DOWDESWELL.

[1875 D. 90.]

Practice—Parties—Administrator ad litem—Judicature Act, 1873, *s.* 24, *sub-s.* 7.

W., claiming to be one of the next of kin of an intestate, took out letters of administration to her estate, and divided the residue among the supposed next of kin, including himself. Afterwards *W.* died, and then the Plaintiff, who claimed to be sole next of kin, and disputed the title of *W.* and the other supposed next of kin, brought a suit against *W.'s* executors, calling upon them to refund a fixed sum of money, which had been agreed on as the net residue of the intestate's estate come to the hands of *W.* as administrator; and praying that so far as might be necessary the estate of the intestate might be administered by the Court. The administrator *ad litem* of the intestate's estate left unadministered by *W.* was made a Defendant to the suit:—

Held (affirming the decision of *Hall*, V.C.), that although the only object of the suit was to establish the title of the Plaintiff as sole next of kin, a general administrator of the intestate's estate was a necessary party to the suit, and not merely an administrator *ad litem*.

Statement.

IN May, 1867, *Maria F. Dowdeswell* died intestate and unmarried.

In September, 1867, *William Dowdeswell*, claiming to be one of her next of kin, took out administration to her estate and divided the clear personal estate between himself and three other persons claiming also to be next of kin.

W. Dowdeswell died in December, 1870, having by his will appointed the Defendants *George M. Dowdeswell* and *E. Davis* his executors.

The present bill was filed by *George Francis Dowdeswell*, who claimed to be sole next of kin to the exclusion of *William Dowdeswell* and the other three persons among whom the intestate's estate had been divided, praying that the executors of *William Dowdeswell* might pay him the sum of £6437, being the agreed amount of the clear personal estate of *Maria F. Dowdeswell* (after allowing for a certain payment therein mentioned) with interest; or otherwise that an account might be taken of the personal estate of the intestate come to the hands of *W. Dowdeswell*; that the Defendants, the executors of *W. Dowdeswell*, might admit assets, or else

that the estate of *W. Dowdeswell* might be administered by the Court; and that so far as might be necessary or convenient the estate of the intestate, *Maria F. Dowdeswell*, might be administered by the Court.

Statement.

The Defendants by their answer took the objection that the legal personal representative of *Maria F. Dowdeswell* was a necessary party to the suit.

On the 21st of November, 1877, the cause came on for hearing before Vice-Chancellor *Hall*, when his Lordship allowed the objection, and ordered that the cause should stand over for twelve months, with liberty for Plaintiff to amend his bill in the meantime by making the legal personal representative of *Maria F. Dowdeswell* a party.

The Plaintiff accordingly made an application to the Probate Division for the revocation of the letters of administration granted to *W. Dowdeswell*, and for the appointment of an administrator *ad litem*. This application was opposed by the Defendants, and eventually Mr. *F. W. Biscoe* was nominated by the Registrar, and on the 25th of April, 1878, letters of administration of the personal estate of the intestate left unadministered by *W. Dowdeswell*, limited to the purposes of this suit, were granted to him.

The Plaintiff then amended his bill by making *Biscoe* a party, and brought on the cause again for hearing on the 2nd of July, 1878.

Argument.

Cookson, Q.C., *W. D. Rawlins*, and *Gibbons*, for the Plaintiff.

Dickinson, Q.C., and *Lawson*, for the Defendant *G. M. Dowdeswell*.

Powell, Q.C., and *Hull*, for the Defendant *E. Davis*.

Vernon Smith, for the Defendant *Biscoe*.

The following cases were referred to: *Davis* v. *Chanter* (1); *Penny* v. *Watts* (2); *Faulkner* v. *Daniel* (3); *Williams* v. *Allen* (4); *Robinson* v. *Bell* (5); *Groves* v. *Lane* (6).

(1) 2 Ph. 545.
(2) 2 Ph. 149.
(3) 3 Hare, 199.
(4) 32 Beav. 650.
(5) 1 De G. & Sm. 630.
(6) 16 Jur. 1061.

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HALL, V.C.:—

I am of opinion that this action is still in a defective state as regards parties, just as it was when it was before me on the former occasion. Certainly my recollection of what took place on the former occasion was that the case was to stand over for the purpose of having a general personal representative of the intestate made a party to the suit. There was no suggestion at that time that the purpose would be answered by having a limited administrator made a party, and the order that I meant to make at that time was that the suit could not proceed without having a general personal representative. That was my view, and it is the view which I still entertain, notwithstanding the very able argument that has been addressed to me by Mr. *Cookson* to the contrary.

The authorities which have been referred to do not appear to me to countenance the view that, in an action like the present, a limited administrator would suffice. We must understand all these cases with reference to the particular circumstances and facts before the Court. Great reliance was placed upon the case of *Davis* v. *Chanter* (1). In that case the whole interest which the persons whose personal representatives were required had in the litigation was, that, at the hearing of the cause before the Vice-Chancellor, some costs had been given to them, and it was said that the cause could not proceed without having those parties represented, because their having had their costs awarded to them was made a matter of complaint. That being so, having regard to the limited character of their interest in the matter, the Court considered that the estate of those deceased parties would be bound generally by having a limited administrator before the Court on discussing the question whether the estate of those parties ought to have costs or not. And if you look at all the cases Lord *Cottenham* referred to as instances in which a limited administrator would suffice, you find they are all of them cases in which the purpose was limited either in its extent, with reference to the litigation before the Court, or else as to time. He says, "Administration is granted during the absence or incapacity of an executor until the will be received in *England*, or until it be found, for the mere purpose of transferring funds into the name of the

(1) 2 Ph. 545, 551.

Accountant-General; to receive a particular sum, to assign a trust term, for putting in an answer or filing a bill in Chancery, or, which is the present case, of substantiating proceedings in Chancery." The same learned Judge laid down as clearly as possible in *Penny* v. *Watts* (1) that a limited administration is not sufficient in a case which, from its nature and character, according to the practice of the Court, involves general inquiries as to next of kin, or general inquiries as to assets and creditors, where in fact the decree would be in that form. That is so in this particular case, notwithstanding the Plaintiff addresses his claim practically to certain ascertained portions of the assets, and that he endeavours by his claim to limit the litigation with reference to those particular amounts. I take it that it would have been quite a matter of course if he could get a decree in this action, that there should be an inquiry as to debts and an inquiry as to next of kin generally in the suit, subject always to this observation, that possibly if it had been ascertained judicially in a proper proceeding that the Plaintiff was the sole next of kin, some special direction might be given as to the inquiry as to the next of kin; or it might be waived altogether.

Then with reference to the other authority, *Faulkner* v. *Daniel* (2), referred to by Lord *Cottenham*, the Vice-Chancellor in that case expressly puts his judgment upon this, that the party could not himself in some particular cases get general administration. There may be cases of that kind, and that might be the reason for dispensing with general administration. But at the same time he says that if you cannot get it the Court will dispense with it, but if you can get it the Court will not act on the limited administration. Therefore that is in substance a direct authority, as it seems to me, against the sufficiency of the limited administration.

The other case, *Williams* v. *Allen* (3), was a case of a very limited kind; it was a case where a tenant for life was said to have received too much, and a representative was wanted who would fight the battle in the action as to whether too large a sum had been paid over to the tenant for life or not. That was for a limited purpose, and it was considered that would suffice.

(1) 2 Ph. 149. (2) 3 Hare, 199. (3) 32 Beav. 650.

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Then the case of *Robinson* v. *Bell* (1), although, it is true, it was decided by Vice-Chancellor *Knight Bruce* before Lord *Cottenham's* decision in *Davis* v. *Chanter* (2), is certainly a very important authority, as shewing the view of the Vice-Chancellor as to the character of cases in which it would suffice to have a limited administration, and negatives the application of the rule which allows of limited administration to a case like the present. It shews that the object and purpose of the Court in these cases is, not to administer the estate piecemeal, but to have a complete administration, and to administer it for the benefit of all parties whose rights come under its cognizance for the purpose of distribution.

The case before the Vice-Chancellor *Kindersley* of *Groves* v. *Lane* (3), although a creditor's action, is also, I consider, an important authority, as shewing what the course of the Court is in administering estates, and looking at that judgment I am satisfied the Vice-Chancellor could not for one moment have thought that in a suit framed like the present the estate would be sufficiently represented by a limited administrator.

The proceedings which have taken place in the Probate Court in reference to this case seem to me to have taken place—indeed I am satisfied they must have taken place—without any substantial discussion on the question whether, when the case came back to this Court, the Court would consider what had been done sufficient to perfect this action. I am quite satisfied the Judge of the Probate Court really never took that into his consideration. He never meant to say, "The Vice-Chancellor, when it goes back to him, will be satisfied that this representation will make the action in his Court complete, and the Plaintiff will be entitled to proceed without discussion as to the sufficiency of what has taken place here."

It is said that the view taken by me does not do justice to the Plaintiff in this case. It is suggested that there is or may have been a loss of evidence for the purpose of substantiating his case as sole next of kin on an application made by him for a general grant. I have said in the course of the argument, in effect, that I do not think the Plaintiff has any right to complain on that

(1) 1 De G. & Sm. 630. (2) 2 Ph. 552.

(3) 16 Jur. 1061.

account. He commenced this suit; very soon after its commencement he had his attention drawn by the answer to the imperfection of his suit, to the impossibility of its proceeding without having a legal personal representative. The suit went on, however, without it till it came before me, the Plaintiff being fully aware from the beginning of the necessity of that course, and the proper course for him to take from the beginning was to have proceeded to obtain administration before the commencement of his action, or, at the very utmost, he might have excused himself, if he could have done so at all, by saying there was no legal personal representative constituted, but proceedings were being taken for that purpose, and that the representative would be made a party if and so soon as the representation was obtained. But he had no right to leave that, as he has left it, for several years from the commencement of his action, first trying to do without it altogether, and then doing that which I hold to be insufficient and imperfect, and leaving the matter exactly where it was when the case was before me on the former occasion.

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It seems to me, therefore, that this action as it stands at present cannot proceed; that has not been done which I ordered to be done, that is to say, that the case should stand over for twelve months, with liberty to the Plaintiff to amend in the meantime by making the legal personal representative of *Maria Frances Dowdeswell*, the intestate, a party to the suit. I hold that to mean, not a limited personal representative, but a general representative of the intestate. The Plaintiff may take such course as he may be advised. The order is apparently not at present worked out or exhausted. Of course I should, if asked, give the Plaintiff liberty further to amend. He must amend at once in order to comply with the order.

From this decision the Plaintiff appealed. The appeal came on to be heard on the 6th of July.

C. A.

Cookson, Q.C., *Rawlins*, and *Gibbons*, for the Appellant:—

Argument.

The grant of administration *ad litem* is sufficient representation of the intestate for all the purposes of this action. The object of the action is not the general administration of the intestate's estate, but solely the determination of the right of the Plaintiff to

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Argument.

a particular fund, which right depends entirely upon the question who are the next of kin of the intestate. If the Plaintiff, having established his title, were to go on to ask for the general administration of the estate, it may be that he would be stopped for want of a general administrator, and in that case such an administrator may be added to the record under Rules of Court, 1875, Order XVI., rule 13; but at this stage of the proceedings the administration *ad litem* is quite sufficient. Even before the *Judicature Act*, in such a case as this, limited administration would have been sufficient: *Davis* v. *Chanter* (1); *Ellice* v. *Goodson* (2); *Robinson* v. *Bell* (3). In *Groves* v. *Lane* (4), where administration *ad litem* was held insufficient, full administration of the estate was required. When a testator dies intestate his personal property vests in the Court, as it formerly did in the Ordinary, and the Court grants it to the administrator, whether *ad litem* or generally: *Williams* on Executors (5); 21 & 22 Vict. c. 95, s. 19. An administrator *ad litem*, as the officer of the Court, has the whole personal estate vested in him, although he is only to act for the purposes of the particular suit. Subject to that restriction, he has full power over it. But our case is stronger, being under the *Judicature Act*, 1873. The technical difficulty which previously existed is now removed. The Chancery Division can now grant letters of administration as well as the Probate Division, and can carry on the investigation as to who are the next of kin as well as the Probate Division. We desire to determine that question in the Chancery Division, for this, among other reasons, that evidence *de bene esse* of witnesses who are now dead has been taken in the suit. If we have to take out general administration in the Probate Division, we shall have to try the whole question as to the next of kin in that Division. It was the object of the *Judicature Act* to avoid suitors being sent from one Court to another.

Dickinson, Q.C., and *Lawson*, for the Defendant *G. M. Dowdeswell*,

Powell, Q.C., and *Hull*, for the Defendant *E. Davis*, and

Vernon Smith, for the Defendant *Biscoe*, were not called on.

(1) 2 Ph. 545.
(2) 2 Coll. 4.
(3) 1 De G. & Sm. 630.
(4) 16 Jur. 1061.
(5) 7th Ed. pp. 401, 402, 524.

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JAMES, L.J.:—

For myself, I am obliged to say that I have always considered, and do still consider, that the point decided by Vice-Chancellor *Hall* was as well established in law and in the practice of this Court before the *Judicature Act* as the legal proposition that the eldest son is the heir-at-law at common law in respect of all the lands not gavelkind, and that all the sons are heirs-at-law in respect of gavelkind lands. It was not only the practice, but it was established by authority, that for a general administration a general administrator is required. Exceptions were allowed in certain particular cases in which a limited administrator was allowed to represent the estate; but in all those cases he was allowed to represent it for the purpose of having a particular question in which that estate was interested determined so as to bind the estate in the hands of a general administrator when appointed. But the general rule was so well established, that, as Vice-Chancellor *Kindersley* said, in *Groves* v. *Lane* (1), though for 200 years the Ecclesiastical Courts had been in the habit of granting limited administration, yet during the whole of those 200 years no case had ever been found in which a general administration had been granted in a suit with a limited administrator. What Vice-Chancellor *Kindersley* said as to the 200 years, more or less, which had elapsed at that time, is equally true of the twenty-five years which have elapsed since Vice-Chancellor *Kindersley's* judgment.

Before the *Judicature Act*, then, it seems to me that this rule was well established, and could not be reasonably arguable. The question is whether there is any ground for saying that the *Judicature Act* has altered the course and practice and established law of this Court. That must be found in the Act itself. It must be something which expressly, or by necessary implication, has altered that which was the established rule. It is said that the *Judicature Act* prescribes a sort of general principle as a rule for our guidance and the guidance of all Courts, that there is to be no multiplicity of actions, and a man is not to be sent from one Court to another. As a general rule no doubt the Legislature has said that where there is a question of law or equity which can be tried it ought to be tried. But there is a particular branch of the Court that is

(1) 16 Jur. 1061.

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appointed for the purpose of granting administrations and probate of wills, and a person cannot at his will and pleasure, or his caprice, transfer the jurisdiction from that branch of the Court to some other branch, because he says, "It is convenient that I should have that determined at the same time that I have something else determined in another branch of the High Court of Justice." A man cannot transfer the jurisdiction in that way.

It is said that in this case there is some hardship on the Plaintiff. The answer to that was given by Vice-Chancellor *Hall* in his judgment. The Plaintiff knew perfectly well at the beginning that he would be required to have a general administrator, and he ought to have taken proceedings to have a general administrator appointed; because in this particular case his case is that he himself is entitled to the general administration, and it was always sufficient to say that a limited administrator was not enough where a Plaintiff has power to obtain general administration if he thinks fit. If he had taken such proceedings he would not have been exposed to the difficulty which it is said he is now exposed to, of having lost some of his evidence; in the meantime I cannot bring myself to doubt that the Vice-Chancellor *Hall* was quite right, and his order must be affirmed with costs.

Brett, L.J.

BRETT, L.J.:—

It seems to me that the first point to be considered is what is the nature of this bill of complaint. It states certain facts which, if they be true, I apprehend would entitle the Plaintiff to the relief he asks, and that relief, upon the face of the bill, is a general administration. Therefore the decree asked for is a decree for general administration. In the words of Vice-Chancellor *Kindersley*, what would be the result of a decree made giving the relief asked for by this claim? It would be a general administration. The next question to be asked is, what is Mr. *Biscoe?* He is not general administrator, he is an administrator for a limited purpose.

That being so, what was the law of the Court of Chancery before the *Judicature Act?* I apprehend it was that upon a bill so framed, asking such relief with such a party to it, the Court would not enter upon the inquiry. That was a valid preliminary objection. Now, it is said that the latter is wholly a technical objec-

tion in the Court of Chancery. If you look at Vice-Chancellor *Kindersley's* judgment in *Groves* v. *Lane* on the first hearing (1), it seems to me that he gives reasons which take it far beyond being a mere technical objection, because he points out that if the Court grants the relief asked for by the bill, it has a person before it whom it cannot order to carry it into effect. If that be true, it is more than technical; but supposing it is technical only, you have the declaration by Vice-Chancellor *Kindersley*, when the case was before him the second time, that for 200 years the Court of Chancery had always refused to enter upon such a suit with such a representation. That has not been denied. But what is the difference between that case and the present? That was the first time in 200 years, and this is the second time in 225. That is the only difference between the two cases. Therefore, as it seems to me, under the old system the objection here made before the Vice-Chancellor would have been valid, although the Probate Court had granted such letters of administration to Mr. *Biscoe* as the Probate Division has now granted.

But then it is said that has been altered by the *Judicature Act*. Now, I do not undertake to say whether the Vice-Chancellor could have granted letters of administration to anybody, as has been suggested in the argument; for the present I take leave, with the greatest respect, to reserve my opinion upon that point. But supposing he could, he was not asked to grant them, and if he had granted them the same difficulty would have arisen. I doubt very much if the old Court of Probate would have granted general letters of administration to Mr. *Biscoe*, and if they would not, I do not think the Vice-Chancellor could have granted them. And if he had granted limited letters of administration to Mr. *Biscoe* in his Court, precisely the same objection would have arisen as now. Therefore the *Judicature Act*, even though it has taken away the distinction of Courts, does not assist this case at all, unless it can be said to be a mere technicality which the *Judicature Act* has done away with.

Now, as I said before, I doubt whether this is a mere technicality, but supposing it is, if it was a technicality which had grown into a rule of practice of the Court which an Appeal Court

(1) 16 Jur. 855.

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before the *Judicature Act* would not have set aside or altered, the *Judicature Act* does not enable this Court to set it aside now; it must remain according to the old rules; and according to the old rules this gentleman does not sufficiently represent the intestate in this suit, and the suit cannot go on, and must be stopped.

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COTTON, L.J. :—

The question is whether or no the estate of the intestate, whose personal property the Plaintiff is claiming, is sufficiently represented in this suit. It arises on a bill filed before the *Judicature Act*, and the first question I will consider is, whether or no, before the *Judicature Act*, this suit would have been sufficiently constituted, in other words, whether the Defendant *Biscoe* would sufficiently have represented the estate of the intestate, so as to enable a decree to be made on this bill.

I consider it well established, that where you want an administration of an estate you must have, not a mere limited administrator, but a general administrator, that is to say, a person constituted by the proper authorities for the purposes of collecting and dealing with the assets; and the distinction is obvious between a case of administration and a case where in the suit the Plaintiff simply wishes to establish that he has a claim against a person who is dead for the purpose of defending the estate. In that case a limited administrator is sufficient, because the suit involves no kind of administration, but simply the decision of the question whether or no the Plaintiff has or has not a good claim against the estate of the deceased. That is a distinction which has been constantly observed and frequently laid down. I think I need not go again through the cases which have been referred to.

Then Mr. *Cookson* admitted that he, in this case, prayed for and required an administration decree, and unless he can in any way take it out of the rule which I have laid down, that would be fatal to the contention that the limited administrator is sufficient for the purposes of the suit. How he tried to put it was this, that the limited administrator was sufficient for the purpose of deciding a preliminary point in the suit, namely, whether or no his client was, as he alleged, the sole next of kin of the deceased. I apprehend that cannot be done. You must look and see what the suit seeks.

It seeks, as he admits, a general administration, and it is only for the purpose of granting that administration and distributing the estate that the Court in this suit goes into the question whether or no the Plaintiff is or is not next of kin, and I apprehend it would be contrary to the course of the Court to enter into the litigation in the suit when it had not before it the proper parties to enable it to make a decree. It is not as if the question of kinship was in an administration suit one distinct subject of litigation, but, for the purpose of administering and distributing the estate in the suit, the Court directs an inquiry as to who are the next of kin, as part of and in the front of the very decree which afterwards directs the accounts and inquiries as to the estate, which, without the proper person before it, could not be made. That being so, you cannot divide the suit; you must have parties, according to the practice of the Court, sufficient to enable the Court to make the decree, which, if that preliminary inquiry was waived, would have to be made at the hearing.

The only remaining question is, whether the *Judicature Act* or the *Probate Act* has in any way altered the matter. The *Probate Act* I only mention to shew that I have not omitted it. In my opinion that Act makes no difference whatever. It simply gives power to grant limited administration to the Court of Probate, and puts the Court of Probate in the same position as the Court, for the purpose of granting administration, was in before, both with regard to vesting estates, and with regard to the particular power of granting these limited administrations.

With respect to the *Judicature Act*, it is said that it is improper for any branch of the High Court to say that this does not sufficiently represent the estate for the purposes of the suit, because another branch of the High Court has decided that it does. Now that is not so; the case would come before the Court both before the Vice-Chancellor in the Court below and here, just the same as if any Vice-Chancellor, or Vice-Chancellor *Hall* himself, having power to grant, had granted this. When parties apply to the Court for the purpose of appointing a person, an officer of the Court if you please, for the purpose of taking a particular proceeding, or for the purpose of effectually constituting the suit, if that is done *ex parte*, of course it is taken at the risk of the

C. A. 1878 DOWDESWELL v. DOWDESWELL. Judgment, C. A. Cotton, L.J.

person who so applies; and when the suit comes on, even if it is not taken *ex parte*, it will be without prejudice to having it decided in the suit, whether or no the person so appointed is appointed with sufficient powers duly to constitute the suit. It is really this, that when the parties have asked the Court to make a particular order appointing a receiver with particular powers, they have to take the risk of that afterwards not being found sufficient for the purpose for which they desire it, namely, for the purpose of proceeding with some other litigation; and it is no more derogating from the power of the Court of Probate to say that these letters of administration are not sufficient in this Court than it was in former days, when you inquired into the question whether the letters of administration granted by the Ordinary were sufficient, and you found they were not. So in the present case the Vice-Chancellor has found that what has been granted by the Probate Division of the High Court, although it is limited to the purposes of the suit, is not such a representation of the estate as, according to the ordinary practice of the Court, is required where you have a general administration. I doubt whether the Judge of the Probate Division ever intended to decide, as between the parties to the litigation here, that the Court of Chancery was bound to hold that by granting this form of administration he had constituted somebody sufficient to enable the Court to make a decree, for which, according to its ordinary practice, it required, not such an administrator, but a general administrator with power to proceed and get in the estate. There is nothing in the *Judicature Act* which enables us in this respect to depart from the ordinary course of the Court. That Act has dispensed with some technicalities, but it has not dispensed with this, if it is a technicality. It is still necessary, as it was before, that in a suit like this, involving administration, there should be, not a limited administrator, but a general administrator, in order to enable the Court to make a decree in the suit.

Solicitors for Plaintiff: *Hayes, Twisden, Parker, & Co.*

Solicitors for Defendants *Dowdeswell* and *Davis: Redpath & Holdsworth.*

Solicitor for Defendant *Biscoe*: *Edward George.*

Ex parte CULLEY. *In re* ADAMS.

C. A.
1878
July 11.

Petitioning Creditor's Debt—Trustee for Absolute Beneficial Owner—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

Notwithstanding the provision of sect. 6 of the *Bankruptcy Act*, 1869, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity," the old rule in bankruptcy remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication of bankruptcy against the debtor, but the beneficial owner must join in the petition.

The rule, however, does not apply to a trustee for persons under disability.

12 Ch. D. 481
14 Ch. D. 37

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 30th of November, 1877, *Margaret Edenborough*, a widow, recovered judgment in an action in the Queen's Bench Division against *A. W. Adams* for £1876 17*s.* On the 24th of April, 1878, she executed a deed assigning the judgment debt for value to *C. J. Culley*. Notice of the assignment was given to *Adams*. On the 27th of May, 1878, *Culley* presented a bankruptcy petition against *Adams*, founded upon the judgment debt. *Culley* made the usual affidavit in support of the petition that the debt was still due to him. Upon the hearing of the petition *Culley* was examined, and admitted that he had no interest whatever in the debt, and had himself given no consideration for it, but that he was a mere trustee for a Mr. *Griffin*, who was the absolute beneficial owner of the debt. It was contended on behalf of *Adams* (*inter alia*) that under these circumstances the petition could not be presented by the trustee alone, but that the trustee and the *cestui que trust* must both join in the petition. The Registrar dismissed the petition with costs. *Culley* appealed.

Argument.

Sir *H. Jackson*, Q.C., and *E. C. Willis*, for the Appellant:—

The old rule in bankruptcy that both the legal and the beneficial owner of a debt must join in a petition for adjudication against the debtor, has been altered by sect. 6 of the *Bankruptcy Act*, 1869. Either the legal owner or the equitable owner alone can now

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sustain the petition. In *Ex parte Cooper* (1) the Chief Judge held that the equitable assignee of a debt could sustain a petition for adjudication against the debtor without joining the assignor. That could not have been done under the old practice. That case is an authority for the present, if *Culley* is to be regarded as merely equitable assignee of the judgment debt. But the effect of subsect. 6 of sect. 25 of the *Judicature Act*, 1873, is to make him the legal owner, and therefore by virtue of sect. 6 of the *Bankruptcy Act*, 1869, he can sustain the petition as legal owner. He is capable of giving a good legal discharge for the debt.

Roxburgh, Q.C., and *Pollard*, for the debtor:—

The ground of the Registrar's decision was that the Petitioner, being a bare trustee of the debt, without any beneficial interest, could not sustain the petition in the absence of the beneficial owner. That was the old rule in bankruptcy: *Ex parte Dubois* (2); *Ex parte Gray* (3); and the rule has not been altered by sect. 6 of the *Bankruptcy Act*, 1869. In *Ex parte Cooper* (4) the beneficial owner of the debt was the petitioner, and the legal owner refused to join. The *Judicature Act* does not affect the present question at all. The Petitioner was never the owner of the debt in equity.

Sir *H. Jackson*, in reply:—

The reason for the old rule appears in *Hope* v. *Meek* (5). It was a rule which would have produced hardship where the legal owner of a debt was a trustee for persons under disability, who were incapable of joining in the petition. Sect. 6 was intended to remedy this mischief. In *Ex parte Gray* the Court was satisfied that the procedure in bankruptcy was being used for a merely collateral purpose.

Judgment, James, L.J. —

JAMES, L.J.:—

It seems to be admitted that, under the law as it stood before the *Judicature Act*, and before the present *Bankruptcy Act*, the

(1) Law Rep. 20 Eq. 762.
(2) 1 Cox, 310.
(3) 4 Dea. & Ch. 778; 2 Mont. & A. 283.
(4) Law Rep. 20 Eq. 762.
(5) 10 Ex. 829.

petitioning creditor's debt would not have been sufficient. It had been established on certain grounds (whether we approve of them or not it is not necessary now to consider, although they do approve themselves to my mind), which were very clear and intelligible, that where there was a bare legal owner of a debt of which some one else was the absolute beneficial owner, the legal owner's oath that the debt was still due to him, that he had not received payment of it, was not enough, but it was required that the beneficial owner should join. That was the law. The beneficial owner was required to join in the petition and in the affidavit. That being so, it appears to me, with all deference to the argument which has been addressed to us with great learning and great energy, that sub-sect. 6 of sect. 25 of the *Judicature Act* has really nothing whatever to do with the point which the Registrar had to decide, and which we now have to decide. A person is the legal owner of the debt; it is exactly the same thing as if originally a bond had been given to *A.* in trust for *B.*, and *A.* had assigned the bond to *C.* The utmost that sub-sect. 6 of the 25th section can do is to place the petitioning creditor here exactly in the same position as if he had been the original obligee of a bond for the debt, but had been the obligee of the bond on behalf of another person who was the real absolute beneficial owner of the debt. But there is nothing in the *Judicature Act*, or in sect. 6 of the *Bankruptcy Act*, to alter the old rule of law or practice of the Bankruptcy Court, that for the safety of mankind the beneficial owner must join in the requisite oath, that the money is justly and truly due, that it has not been paid, and that he has no security for it. It was considered not sufficient to have only the oath of a man to whom in fact not a farthing was due, and who might know nothing at all about the security which the real owner had got. In my opinion that old rule has not been altered, and therefore I think the Registrar's order was quite right.

Judgment, James, L.J.

BRETT, L.J.:—

Brett, L.J.

According to the old law in bankruptcy, it seems that the mere legal owner of a debt in a case like the present could not have obtained an adjudication without joining his *cestui que trust* with him. That was the law before the present *Bankruptcy Act*. It

C. A. 1878 *Ex parte* CULLEY. *In re* ADAMS. Judgment, Brett, L.J.

seems to me that the 6th section of that Act was not intended to alter that law. That section is speaking of the debt, not of the person who can prove in respect of it; and it divides debts into two kinds, viz., debts at law and debts in equity, but it does not speak of the person who may petition in respect of either kind of debt. That being so, let us see what the case is here. This is a legal debt, and it may be that by virtue of the *Judicature Act* the Petitioner has become the legal owner of that legal debt. Therefore, if he had not been a trustee, if he had been an ordinary legal owner of the debt, he might have obtained an adjudication on his own petition only. But, assuming him to be the legal owner of the debt, he is not only that, but he is trustee of it for a *cestui que trust*, and he therefore comes within the old rule in bankruptcy, and unless the present *Bankruptcy Act* has altered the old rule, he is in the same position as if he had been the original owner of the debt, but original owner and trustee. Upon the construction of sect. 6 of the *Bankruptcy Act*, it seems to me that it does not enable him to support his petition without joining his *cestui que trust*.

Cotton, L.J.

COTTON, L.J. :—

We must consider what was the law, or rather the practice in bankruptcy, before the passing of the *Bankruptcy Act*, 1869, and the *Judicature Act*. Now in former days it was necessary, in order to support a petition for adjudication, that there should be a legal debt, and *primâ facie* a creditor entitled to a good legal debt could support a petition for adjudication. But if it turned out that, although he was entitled to the legal debt, that is, entitled at law, he was not absolutely entitled to it by reason of there being a beneficial ownership in some one else, and the beneficial owner was a person who had it in his power to deal as he thought fit with the debt, either by releasing it or by receiving it, then the practice in bankruptcy was that the beneficial owner must join in the petition with the legal creditor, for the purpose of satisfying the Court that the debt had not been released or paid. That, I understand, was the old rule. Now the question arises whether any alteration has been made by the 6th section of the present *Bankruptcy Act*, or by the *Judicature Act*. The 6th section of the *Bankruptcy Act* says that the debt of the petitioning creditor

must be a liquidated sum due at law or in equity. Was that in any way intended to interfere, or has it interfered with the rule to which I have referred? In my opinion it was intended to do this, amongst other things—to make an equitable debt, that is, a debt enforceable only in equity, capable of supporting a petition. But, in my opinion, it was not intended to, nor does it, enable a person to whom a debt is due at law, but who is not entitled to it beneficially, alone to present and support a petition for adjudication against the debtor. The words are, "must be a liquidated sum due at law or in equity." I do not think that means to deal with the question whether there is a title in equity as distinguished from the title at law, but it means simply that a debt in equity, an equitable debt, or a debt at law, a legal debt, will be either of them sufficient to support a petition, and it in no way deals with the person who must come before the Court representing the debt. Therefore I think that the old rule still remains, that if there is a legal debt and the person coming before the Court in respect of it is not the beneficial owner, there must be brought before the Court also the beneficial owner, if he is a person capable of dealing with the debt. I say that, because the old rule never applied to a case where the debt was held in trust for married women or infants, or other persons under disability. In that case you could not bring the persons beneficially interested before the Court, and it never was required that they should be brought before the Court when none of them was capable of dealing with the debt. The principle on which it was necessary that the beneficial owner should be brought before the Court did not apply to such a case. The *Judicature Act* does not, in my opinion, affect the matter. Assuming that the 25th section applies, the petitioning creditor is to be considered the legal owner of this debt. Still he is the legal owner only in trust for some one else, and the old rule in bankruptcy comes in, that the beneficial owner must be brought before the Court when a petition is founded on the debt.

Solicitors for Appellant: *Sole, Turner, & Knight.*
Solicitors for Respondent: *Cottman & Collings.*

C. A.
1878
C. J. B.
April 15.
C. A.
May 23.

Ex parte BOLLAND. *In re* DYSART.

Undischarged Debtor—Fresh Trading—Credit obtained on Faith of Representations of Trustee—Assent of Creditors—Right of Trustee to Debtor's Property.

D. & C., who traded in partnership, filed a liquidation petition on the 4th of December, 1876. On the 19th of December the creditors resolved on a liquidation by arrangement, appointed *B.* trustee, with a committee of inspection, and resolved that the debtors' discharge should be granted upon the committee of inspection and the trustee certifying that they were entitled to it. On the 3rd of January the committee resolved that *C.* should be allowed to realize the stock-in-trade and to collect the debts due to the estate, under the supervision of the committee, for six months from that day, the committee receiving the proceeds; that, if 7*s.* 6*d.* in the pound and the costs of the liquidation were thus realized, a further 7*s.* 6*d.* in the pound should be accepted from *C.* for the remainder of the estate, if it was paid within three months; that *D.* should be allowed his discharge, subject to the payment of his private debts, and that *C.* should have his discharge on payment of the 15*s.* *C.* realized the stock-in-trade and the debts, and out of the proceeds paid £719 to the committee, and £60 to the trustee for his costs of the liquidation. The £719 was not enough to pay the first 7*s.* 6*d.*, but that was in fact paid soon after it became due to all the creditors who had proved. There were only eight of them. The debtors' bankers, to whom they owed £251 at the commencement of the liquidation, did not prove, because they were amply secured by a mortgage of real estate of *C.*, which he had executed in favour of the bank in February, 1876, to secure moneys advanced by them to him or to his firm. In February, 1877, *C.* commenced trading again alone. Seven of the old creditors dealt with him again and gave him credit. Before he recommenced business he applied to the bank to give him credit on the security of the mortgage. The bank manager had an interview with the trustee, and asked him whether the bank might safely deal with *C.* The trustee told him that the matter was quite out of his hands, and that it would be all right. The bank then agreed to give *C.* fresh credit. The second instalment of 7*s.* 6*d.* was not paid when it became due. The creditors applied for payment to *C.*, not to the trustee, but did not take any steps to enforce payment. Ultimately *C.* paid the second instalment to one of the creditors and part of it to some of the others, making the payment in part by means of cheques on the bank. In July, 1877, the mortgaged property was sold by *C.*, with the consent of the bank, for £1180, which was paid to the bank and carried to the credit of *C.'s* account. In August, 1877, he was adjudicated a bankrupt. At the end of July, 1877, the trustee's solicitor had claimed the £1180 from the bank. After the adjudication the trustee in the liquidation applied to the County Court for an order that the bank should pay the £1180 to him. The Judge ordered the bank to pay over the balance, after deducting the debt due to them by the

firm of *D. & C.* and the advances made by them to *C.* after the date of the liquidation petition:—

Held, by *Bacon*, C.J., and by the Court of Appeal, that, having regard to the representations made by the trustee to the bank, and the conduct of the creditors, the bank were entitled to retain out of the purchase-money the advances which they had made to *C.* since the filing of the liquidation petition.

Per Baggallay, L.J.:—Upon the principle of *Troughton* v. *Gitley* (1), the representations made by the trustee would of themselves have been sufficient to give the bank the right which they claimed.

Per Bramwell, L.J.:—The principle of *Troughton* v. *Gitley* did not apply.

Statement.

JOHN DYSART and *John Carragher* carried on in partnership at *Liverpool* the business of provision merchants. Their bankers were the *Adelphi Bank, Limited.* On the 29th of February, 1876, *Carragher*, in consideration of advances already made and of advances to be thereafter made to him alone or to his firm, and to secure the balance which at any time might be due to the bank by him alone or by him jointly with any co-partner of his, mortgaged to the bank some real estate in *Londonderry* belonging to him, and some policies of assurance. The mortgage deed contained a power of sale.

On the 4th of December, 1876, *Dysart* and *Carragher* filed a liquidation petition. The first meeting of the creditors was held on the 19th of December, when it was resolved that the affairs of the debtors should be liquidated by arrangement; that *Henry Bolland* should be appointed trustee of their property; that *Edwin Whitworth* and *John Hargreaves* (two of the creditors) should be appointed a committee of inspection; and that the discharge of the debtors should be granted upon the committee of inspection and the trustee certifying that they were entitled thereto. On the 3rd of January, 1877, the committee of inspection passed the following resolutions:—

"That one of the debtors, namely, *John Carragher*, be allowed to realize the stock-in-trade, and collect the debts due to the estate under the supervision of the committee of inspection for the space of six months from this day, the committee receiving all proceeds as realized.

"That, in the event of the stock-in-trade and debts realizing

(1) Amb. 630.

C. A. 1878 *Ex parte* BOLLAND. *In re* DYSART. Statement.

7*s.* 6*d.* in the pound and the costs of the liquidation proceedings, an amount sufficient to pay a further sum of 7*s.* 6*d.* in the pound be accepted from the said *John Carragher* for the remainder of the estate, provided it is paid within three months from this day.

"That *John Dysart* be allowed his discharge and furniture, subject to the payment of his private debts.

"That *John Carragher* also be allowed his discharge on payment of the aforesaid 15*s.* in the pound."

Dysart obtained his discharge on the 24th of January, 1877. After the passing of the resolutions of the 3rd of January, *Carragher* proceeded to realize the stock-in-trade, and to collect the debts, and he at various times paid to the committee of inspection, from the proceeds of the realization, sums amounting altogether to £719 8*s.* 9*d.*, and he also paid to *Bolland* £60 for his costs of the liquidation. This sum was not sufficient to pay the creditors the first instalment of 7*s.* 6*d.* in the pound, which amounted to about £950; but that instalment was, with the aid of other moneys furnished by *Carragher*, paid, soon after it became due, to all the creditors who had proved, who were only eight in number. The amount due from the debtors to the bank at the date of the filing of the petition was £251 7*s.* 6*d.* The bank, being fully secured, did not prove in the liquidation. In February, 1877, *Carragher* commenced business again alone at a new place of business, and seven of the eight creditors renewed their dealings with him, and gave him fresh credit. Before commencing his new business he, on the 21st of February, 1877, had an interview with Mr. *Harrison*, the manager of the bank, and told him that he was about to start in business on his own separate account, and asked *Harrison* to allow him to open an account with the bank. He said that his creditors had handed the estate back to him, and that he was to pay them 15*s.* in the pound by two equal instalments, and that he wished to be allowed to overdraw his account to the extent of £500, and to have discount to the extent of £750 against the securities which he had already given to the bank. *Harrison* told him that he could do nothing until he had consulted the committee of the bank, and had communicated with *Bolland*. *Harrison* then called upon *Bolland*, and (according to *Harrison's* evidence) told him of *Carragher's* request, and asked him whether *Carragher's* state-

ment with regard to his estate was true, and whether the bank might safely deal with him. *Bolland* replied, "Yes; the matter is quite out of my hands, and it will be all right. Mr. *Hargreaves* seems to have taken a great fancy to *Carragher*, but I don't understand why." *Bolland*, in his evidence, said that he could not pledge his memory as to what passed at this interview, but he said that he told *Harrison* that *Carragher's* affairs were practically out of his hands. He admitted that something might have been said about *Carragher's* opening an account with the bank, but he said that he never agreed that the bank should hold the securities to cover future advances. *Harrison* the next day informed the bank directors of *Carragher's* request, and repeated to them what *Bolland* had said, and they then agreed to accede to *Carragher's* application, and accordingly £500 was placed to the credit of his current account, and the bank also discounted bills for him. On the 22nd of February he drew a cheque for £150, in part reduction of the balance of £251 7*s.* 6*d.* due from his late firm to the bank. He continued to carry on business alone until August, 1877, when he was adjudicated a bankrupt. During this period the seven old creditors continued to deal with him, and gave him credit. He availed himself of the credit given to him by the bank. He did not pay the second instalment of 7*s.* 6*d.* in the pound when it became due, and the creditors took no steps to enforce its payment. But before the adjudication he had paid the whole of the second 7*s.* 6*d.* to one of the creditors, and had paid part of it to some of the others, and he made these payments partly by means of cheques upon the bank. There was evidence that the creditors applied for the second 7*s.* 6*d.*, not to *Bolland*, but to *Carragher*. On the 25th of July, 1877, *Carragher* drew a cheque for £101 7*s.* 6*d.*, the balance of the debt due from his late firm to the bank, and applied it in payment of that balance.

In July, 1877, *Carragher*, with the consent of the bank, sold the property in *Londonderry*, and on the 18th of July the bank executed a reconveyance of the property to him. The purchase-money, amounting to £1180, was received by the bank, and was carried to the credit of *Carragher's* account. At the time of the adjudication there was a considerable sum due from him to the bank. At the end of July, 1877, *Bolland's* solicitors on his behalf

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Statement.

made a claim upon the bank for the £1180, the purchase-money of the *Londonderry* property. The bank asserted that they were entitled to retain out of that sum the amount of the advances which they had made to *Carragher* since the commencement of the liquidation, as well as the balance due to them from the firm of *Dysart & Carragher* at the time when the petition was filed. *Bolland* then applied to the *Liverpool* County Court for an order that the bank should pay over the £1180 to him, and deliver to him the policies of insurance, as being part of the estate of *Carragher* vested in *Bolland* as trustee. The bank did not claim the policies. The Judge ordered the bank (after deducting their costs) to pay over to *Bolland* the sum of £146 4*s.* 4*d.*, the balance of the £1180 in their hands, after deducting all moneys due and owing to them from *Carragher*, with interest, and to deliver up the policies. *Bolland* appealed to the Chief Judge. The appeal was heard on the 15th of April, 1878.

Argument.

Winslow, Q.C., and *T. H. James*, for the Appellant:—

The trustee acted under the directions of the committee of inspection. There is no duty on the part of the trustee to look after an undischarged debtor: *Ex parte Ford* (1). Except under sect. 28 of the *Bankruptcy Act*, 1869, the trustee could not sell the estate for a composition. As to the validity of the security, they cited *Baillie* v. *M'Kewan* (2); *Parker* v. *Clarke* (3). As to the effect of the second adjudication, they cited *Ex parte Charlton* (4).

The trustee never intended to give up his right to this security, which was the only security the creditors had for the payment of the second instalment. The trading again by the debtor cannot affect this security.

De Gex, Q.C., and *W. R. Kennedy*, for the bank, were not called on.

Judgment, C. J. B.

BACON, C.J., after stating the facts, continued:—

I am far from adopting the opinion that it is the duty of a trustee so to watch the debtor and to track his conduct, as that, if he

(1) 1 Ch. D. 521.
(2) 35 Beav. 177.
(3) 30 Beav. 54.
(4) 6 Ch. D. 45.

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can be seen carrying on his business or entering into any engagements, the trustee must be taken to know that. That is not a part of the trustee's duty; but this is plainly the duty of a trustee for the creditors, in whom is vested all the debtor's estate, to see that no part of that estate is misapplied.

[His Lordship then referred to the evidence relating to the interview between *Harrison* and *Bolland*, and continued:—]

Judgment, C. J. B.

The question then comes to this. A trustee in bankruptcy, who is asked by bankers dealing in the ordinary way of their trade whether it is safe for them to enter into transactions in the shape of an account with the debtor, says, "You may do it with perfect safety. I have no objection to make." They adopt what he says to them; they open a banking account with the debtor, to which they carry the £1180 that was transmitted to them, and then comes a time subsequently when the debtor becomes bankrupt, and Mr. *Bolland's* vigilance is very naturally excited, and he claims all that he, as *Carragher's* trustee, can claim. The question is, whether he is at liberty to overlook, abrogate, and pass by all these transactions into which he had induced Mr. *Harrison* to enter. I do not use too strong a phrase when I say "induced," for without his representations Mr. *Harrison* would never have opened the account with *Carragher*. I do not think it is in the least degree unreasonable, considering the powers and the duties of Mr. *Bolland*, that he should not be able now, after that interview with Mr. *Harrison*, and with as much knowledge as it is clear he must have possessed on the subject, to treat the account as if it had been an account with him. I think that the learned Judge has dealt with the case properly, and that the objections raised to his order cannot be sustained. The appeal will be dismissed with costs.

C. A.

From this order the trustee appealed. The appeal was heard on the 23rd of May, 1878.

Argument.

Winslow, Q.C., and *T. H. James*, for the Appellant:—

The trustee did nothing to mislead the bank. *Harrison* ought to have looked at the resolutions of the committee of inspection before he gave fresh credit to *Carragher*. If the trustee did

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mislead the bank they may have a remedy by action against him, but the rights of the creditors are not affected. The trustee had no power to give the bank a charge on the debtor's property by a mere loose conversation.

De Gex, Q.C., and *W. R. Kennedy*, for the bank:—

The order appealed from is in accordance with the principle of *Troughton* v. *Gitley* (1); *Tucker* v. *Hernaman* (2); *Engelback* v. *Nixon* (3); *Ex parte Ford* (4). Indeed *Troughton* v. *Gitley* goes further than is necessary for the present case. Here the trustee made an actual representation to the bank, on the faith of which they acted. There were only eight creditors under the liquidation, and they all knew that they could only be paid by means of advances made by the bank. If the trustee had said nothing, but had merely stood by, that would have been enough. *Ex parte Tinker* (5) is another illustration of the principle. The trustee can bind the creditors by any equity which affects himself. It would be contrary to good faith and common honesty, after the representations made by the trustee to the bank, they should be deprived of this money. The doctrine of *Pickard* v. *Sears* (6) applies. If a man is allowed to commence trading again, an implied power is given to him of obtaining credit or advances from his bankers. And the creditors have by their conduct affirmed that which was done by the trustee. Even if the trustee could have intercepted the proceeds of the sale of the property, he cannot now recover it from the bank to whom it has been paid: *Ex parte Dewhurst* (7). Independently of the representations made by the trustee, the bank are entitled to retain this money, for they have given full value to the creditors for it.

Winslow, in reply:—

Sect. 26 of the *Bankruptcy Act*, 1869, authorized the resolution which allowed *Carragher* to wind up the estate. The principle of *Troughton* v. *Gitley* applies to the earnings of an undischarged bankrupt; it has never yet been extended to property which he

(1) Amb. 630.
(2) 4 D. M. & G. 395.
(3) Law Rep. 10 C. P. 645.
(4) 1 Ch. D. 521.
(5) Law Rep. 9 Ch. 716.
(6) 6 A. & E. 469.
(7) Law Rep. 7 Ch. 185.

had at the time of the adjudication. If the doctrine is to be thus extended it will be difficult to act upon sect. 26 at all. It is not the duty of the trustee to watch the proceedings of the bankrupt, except with regard to property intrusted to him for realization: *Ex parte Ford* (1). *Ex parte Dewhurst* (2) is distinguishable. There an undischarged bankrupt had paid money for valuable consideration, and it was held that the money could not be followed in the hands of the payee.

JAMES, L.J.:— Judgment, C. A. James, L.J.

The case has been very ably argued, and all the points have now, I think, come out pretty clearly.

The result, to my mind, and, I believe, to the minds of my learned colleagues, is, that we cannot differ from the findings of the two Courts. I would say more distinctly that we cannot differ from the finding of the County Court Judge, who, as it appears to me, has rightly summed up the evidence and drawn the proper conclusion from it, to this effect, which I may state shortly as being the inference which I myself draw from all the facts, not only from the conversations between Mr. *Harrison* and Mr. *Bolland*, but from all the facts and circumstances in the case. It comes to this—that the trustee, with the full assent of the creditors, left the property to be dealt with by the debtor as if it were his own, a good consideration moving them thereto. The bank was informed of the facts and acted upon them, trusting not only to the words, but to the conduct of the parties.

I think that, under such circumstances, it is impossible for the trustee to complain of what the bank did in good faith, and what his own language and the conduct of the creditors induced them to do.

BAGGALLAY, L.J.:— Baggallay, L.J.

I entirely concur.

BRAMWELL, L.J.:— Bramwell, L.J.

I also concur. I wish, however, to state the reasons for my concurrence, because I was for a considerable time in favour of

(1) 1 Ch. D. 521, 529. (2) Law Rep. 7 Ch. 185.

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the Appellant, and I should have continued to be so if the case had rested on a mere talk between the Appellant and Mr. *Harrison*. I should, I confess, have thought it a most mischievous thing to act upon such a ground as that, when the bank might have had an opportunity of satisfying themselves of what the actual facts were. I am of opinion that Mr. *De Gex's* argument, founded on *Troughton* v. *Gitley* (1) (with which case and its progeny he entertained us to our great delight at *Westminster* some time ago), does not touch the present case. But I entirely agree with the reason of the decision given by Lord Justice *James*, and why I do so, I wish to say because I indicated an opinion or shewed a tendency favourable to the Appellant for a considerable time. I wish to shew why I have changed my opinion, not upon the ground on which it was originally formed, but upon a new consideration which has presented itself. All the creditors but one of this debtor continued to deal with him. That one was a creditor for only £28, and ten guineas would have satisfied his second 7*s.* 6*d.* in the pound. One can very well understand that those creditors who continued to deal with the debtor, or were desirous that he should go on, did so and were so because he was and would be a customer. But how was he to go on and to trade with them? How was he to realize his second 7*s.* 6*d.* in the pound? Of course he might borrow it, he might find friends to lend it to him. But one very easy means of his paying the second 7*s.* 6*d.* and starting afresh in business would be to hand over to him the power of disposition of the equity of redemption of the mortgaged property, and allow him to deal with it.

Now what do we see? In the first place, the trustee gets his costs paid as though he was done with. In the next place, although the second 7*s.* 6*d.* in the pound ought to have been paid by the beginning of April, it was not paid. No complaint was made by any of the eight creditors, seven of whom were dealing with him, and the other being a person of very small consequence who may almost be left out of consideration. No complaint was made, no step to enforce payment was taken by any of the creditors. In addition to that, we have the statement made by the trustee to *Harrison*, which, as I have said, I should not have been pre-

(1) Amb. 630.

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pared to act upon if it had stood alone. He said, and said truly enough, if my view of the facts is the correct one, "the liquidation is ended." Or he might have expanded it, and said, "All his creditors but one for a small amount, about whom we did not trouble ourselves, are dealing with him afresh. My costs are paid, and the man is starting afresh." I think that is the purport of what Mr. *Bolland* said. I believe him fully, and I believe Mr. *Harrison* too. It seems to me that the representation was in accordance with the facts—"The thing is practically ended, the man is his own master, and is entitled to the equity of redemption, and will settle separately with his creditors." It appears that he has paid the second 7*s.* 6*d.* in the pound to one of them, and to the rest partly, and that they took it direct from him, and not through the trustee.

Well, then, in addition to that, it must be borne in mind that, although the trustee knew of the existence of this mortgaged property, because it was mentioned in the debtor's statement of affairs, and was estimated at £855—although he knew of its existence, he made no claim to it until the debtor was about to stop again, or was insolvent, and had shewn that the second 7*s.* 6*d.* in the pound was in jeopardy. Upon these considerations I come to the conclusion, which has been enunciated by Lord Justice *James*, that the liquidation as a liquidation was at an end, and that the man was allowed to deal with his remaining property in such a way as he thought fit, with the assent of the trustee and the creditors. As to whether the £28 creditor will have any claim against the trustee for not getting in his second 7*s.* 6*d.* in the pound, it is unnecessary to express any opinion, but one can very well understand that that small amount was disregarded.

I am of opinion, therefore, that the judgment of the Chief Judge should be affirmed.

BAGGALLAY, L.J.:—

I have already expressed my general concurrence in what fell from Lord Justice *James*, and I agree with almost everything which has been said by Lord Justice *Bramwell*, with one exception, which I think it right to mention. I cannot agree with him in thinking that the principle of *Troughton* v. *Gitley* (1) is not

(1) Amb. 630.

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applicable to the present case; for I think it does apply, and that it supports our judgment.

Appeal dismissed with costs.

Solicitors for Trustee: *Burton, Yeates, & Hart*, agents for *Tyrer, Kenion, & Tyrer, Liverpool.*

Solicitors for Bank: *Brook & Chapman*, agents for *T. Goffey, Liverpool.*

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V.-C. B. *April* 12.

C. A. *May* 22, 29.

In re WINCHAM SHIPBUILDING, BOILER, AND SALT COMPANY.

POOLE, JACKSON, AND WHYTE'S CASE.

Winding-up—Contributory—Companies Act, 1862, *s.* 164—*Fraudulent Preference.*

14 Ch D. 669

Three directors, who had not paid or been called upon to pay anything on their shares, made themselves liable on their personal guarantee for money advanced to the company by a bank. The company being in difficulties, and the bank having recovered judgment against the guarantors, a resolution was passed by the board of directors that in order to reduce the debt due to the bank the directors be recommended to pay in advance the amount of their shares. The three directors subsequently paid a sum equal to the amount of their shares, which was carried to the credit of the company at the bank. Two days afterwards a petition was presented on which an order for winding up was made:—

Held (reversing the decision of *Bacon*, V.C.), that the three directors were guilty of no breach of trust or duty to the company in paying up their shares in order to relieve themselves of their personal liability to the bank; that the payment was a valid payment on account of the shares; and that the shares must be treated as paid-up shares.

Statement.

THIS was an application on behalf of the official liquidator of the *Wincham Shipbuilding, Boiler, and Salt Company, Limited*, to place Messrs. *Robert Poole, J. Jackson*, and *J. G. Whyte* on the list of contributories of the company.

In March, 1876, the company was formed and registered without articles of association for the purpose of acquiring and taking over the works, plant, and business of Mr. *Joseph Parks* at *Wincham* in *Cheshire.*

Messrs. *R. Poole, Jackson*, and *Whyte* signed the memorandum of

association for fifty £5 shares each, and became directors of the company, but did not pay any deposit on their shares.

On the 1st of May, 1876, at a meeting of the company, *R. Poole*, as chairman, reported as the result of an interview with the manager, that *Parr's Banking Company* would not allow any overdraft without the personal guarantee of the directors; and it was resolved that the directors should give their personal guarantee for £5000 to the bank, and that *R. Poole* should carry out the arrangement.

The guarantee was given by the directors, including *Poole*, *Jackson*, and *Whyte*, and the money obtained from the bank was expended in carrying on the business of the company, and no call was made.

The company got into difficulties, and in May, 1877, the bank recovered judgments against the guarantors, including *Poole*, *Jackson*, and *Whyte*.

At a meeting on the 6th of August, 1877, a minute was made that, "In order to reduce the balance due to *Parr's Banking Company*, it is recommended that the directors do pay up the amount of their shares as authorized by Art. 7 in Table A., and as contemplated in the company's prospectus." At the same meeting it was resolved to close the business of the company, and to advertise for sale the plant, &c., and the company had from that time ceased to carry on business.

No call was made, but on the 4th of September, 1877, Messrs. *R. Poole*, *Jackson*, and *Whyte* tendered to *Enoch Johnson*, the person who had been appointed as *pro tem.* secretary, three several sums of £250 as the amount due on their shares, and asked him to sign a receipt as secretary for these sums as share money. *Johnson* declined to receive the money or to give a receipt, "as he did not understand why he should be called upon then to give a secretary's receipt for share money at that lapse of time." The £750 was then paid to *W. Poole*, who was a son of *R. Poole*, and had, as it appeared, attended the directors' meetings and made the entries in the minute books, and described himself as having "discharged the duties of acting secretary" up to the time when the winding-up petition was filed. The receipt was signed "*pro* secretary, *William Poole*," and the three sums of £250 each were

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paid to *Parr's Banking Company*, and entered in the pass-book as payments to the credit of the company.

On the 6th of September a petition was presented for winding up the company, and on the 10th of November, 1877, a winding-up order was made.

Statement.

The question was whether by this payment (which amounted to the full amount due upon their shares) Messrs. *R. Poole, Jackson*, and *Whyte* had discharged themselves from liability.

The application was heard before Vice-Chancellor *Bacon* on the 12th of April, 1878.

Argument.

Sir *H. Jackson*, Q.C., and *H. B. Buckley*, for the official liquidator:—

By the payments made on the 4th of September, 1877, which were received by the bank as payments on account of, and in reduction of, the amounts owing by Messrs. *Poole*, *Jackson*, and *Whyte* in respect of their personal guarantee and in part satisfaction of the judgment recovered against them, these directors did not discharge themselves from liability for the amount due on their shares. Being under the double liability of £750 in respect of their shares and £750 in respect of their guarantee to the bank, they have attempted, by paying the sum of £750, to discharge themselves from their liability for £1500. Having regard to the circumstances—the time when the payment was made, two days before the commencement of the winding-up, when the company was to their knowledge insolvent, and the receipt given by an unauthorized person after the refusal of the regular secretary—the whole thing was a mere contrivance by persons, in a fiduciary position as directors, to gain an advantage to themselves at the expense of creditors of the company; and as such is invalid as a fraudulent preference under the *Companies Act*, 1862, s. 164: *Habershon's Case* (1); *Gaslight Improvement Company* v. *Terrell* (2); *Sykes' Case* (3). No doubt, as in the *Gaslight Improvement Company* v. *Terrell*, these directors have advanced money for the benefit of the company, but they are not entitled on the verge of liquidation to give themselves a preference. They must each pay the £250 due on these shares, and then they will be entitled

(1) Law Rep. 5 Eq. 286. (2) Law Rep. 10 Eq. 168.
(3) Law Rep. 13 Eq. 255.

to a dividend *pari passu* with the other creditors in respect of the £750 paid on account of the company.

Hemming, Q.C., and *Badcock*, for *Poole*, *Jackson*, and *Whyte*:—

There has been no fraudulent preference so as to render this payment invalid under the *Companies Act*, 1862, s. 164. The debt was due from the company, whose account was at the time overdrawn, to the bank; and to enable the company to pay that debt these directors, in pursuance of the request by the company contained in the minute of the 6th of August, 1877, make this payment to the extent of their own liability. Then how is such payment affected by the authority of *William Poole*? The company have had the benefit of the payment, and whatever may have been *William Poole's* formal position, it is admitted that he did the actual work of secretary in the place of *Enoch Johnson*. In the *Gaslight Improvement Company* v. *Terrell* (1) and *Habershon's Case* (2) the directors were themselves creditors of the company and applied the payment in discharge of their own debt, and the test was whether the company was insolvent or not; but in considering the allegation of fraudulent preference, the date of the recommendation or agreement pursuant to which this subsequent payment was made, and not the date of actual payment, must be regarded: *Ex parte Hodgkin* (3); *Ex parte Kevan* (4). The company was not insolvent, and did not contemplate liquidation on the 6th of August, 1877, but was taking measures to stave it off: *Ex parte Tempest* (5). Even assuming, as regards the other creditors, that there was a fraudulent preference, the money paid can be recovered from the bank, but these directors, having fully discharged themselves from the amount due on their shares, cannot be called upon to pay twice over. Moreover, as directors in the position of trustees, they were entitled and bound to pay debts of the company and to apply the trust moneys for that purpose, and having incurred liability as sureties of the company, they were entitled to indemnify themselves out of the assets: *In re German Mining Company* (6).

(1) Law Rep. 10 Eq. 168.
(2) Ibid. 5 Eq. 286.
(3) Ibid. 20 Eq. 746, 754.
(4) Law Rep. 9 Ch. 752, 758.
(5) Ibid. 6 Ch. 70.
(6) 4 D. M. & G. 19.

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POOLE, JACKSON, AND WHYTE'S CASE.
Judgment, V.-C. B.

Sir *H. Jackson*, in reply.

BACON, V.C.:—

The difficulty in this case arises from one set of persons having different duties and different interests, their duty as directors and their interest as guarantors being in conflict. It is an undoubted and uncontroverted fact that the company was insolvent. There was no money of the company to pay creditors, and urgent representations had been made by the creditors for payment of these debts, to meet which the company had no means and no banking account on which they could draw. It is established, therefore, that the company was clearly in a condition of insolvency. Under these circumstances a resolution was passed on the 6th of August, 1877, recommending the directors to pay up the amount of their shares, which had never been called up and which they had never offered to pay. No demand was made on the directors, and nothing was done until the 4th of September, when the money was paid at the office of *William Poole*, who took upon himself to act in the matter without any authority. Then three directors hit upon this plan of paying their own debt to the bank and at the same time discharging the liability on their shares. They bethink themselves of the pretence of paying £750 to the company, but in reality of handing it over to the bank. It was a mere contrivance, and there was no reality or substance in the transaction, except that by means of it £750 was paid by them in discharge of their own guarantee. The right of the company to receive £750 was thwarted and frustrated by this act of the directors. It was the duty of the directors to maintain the assets of the company and to distribute them according to law and not to give any one creditor a preference over another; and any contrivance by which, in contemplation of bankruptcy or winding up, the assets were intercepted in favour of one creditor to the exclusion of others, was unlawful and invalid under the *Companies Act*, 1862, s. 164. What these directors have done was just that invalid or unlawful transaction pointed at by this section. For whose good was this payment made? Not that of the company, but of themselves. *Sykes' Case* (1) [to which his Lordship referred] was very similar.

(1) Law Rep. 13 Eq. 255.

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POOLE, JACKSON, AND WHYTE'S CASE.

Here there was a contrivance to create a fund by means of which their guarantee should be discharged; and here, as there, there was a contrivance by which the directors seemed to pay, but did not in fact pay, the amount owing on their shares. It has been contended that these directors were trustees, and had a right to be indemnified in respect of payments made by them on behalf of the company. But this contention has no application to the present case. The money of the directors went to discharge the directors' own debts without any benefit to the company, their *cestuis que trust*, and therefore they owed this £750 to the company in respect of their shares as much as ever they did. The bank, if sued on the ground that this payment was a fraudulent preference, would say in defence that it was not a payment by the company but by the guarantors. These gentlemen must remain liable, as the £750, which ought to have been assets of the company, had been applied for the benefit of these directors and not of the company. Messrs. *Poole*, *Jackson*, and *Whyte* must be settled on the list of contributories without crediting them for anything in respect of their payment of £750 to the bank.

Judgment, V.-C. B.

C. A.

From this decision *Poole, Jackson, & Whyte* appealed. The appeal was heard on the 22nd of May, 1878.

Argument.

Hemming, Q.C., and *Badcock*, for the Appellants.

Sir *H. Jackson*, Q.C., and *H. B. Buckley*, for the official liquidator.

The same line of argument was followed as before the Vice-Chancellor. The following cases were referred to by the counsel for the Respondent:—*Gilbert's Case* (1); *Habershon's Case* (2); *Sykes' Case* (3); *Gaslight Improvement Company* v. *Terrell* (4).

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The Vice-Chancellor has decided that these gentlemen are liable to pay £250 each in respect of a call on their shares, although they allege that they have paid the whole value of their

(1) Law Rep. 5 Ch. 559.
(2) Ibid. 5 Eq. 286.
(3) Law Rep. 13 Eq. 255.
(4) Ibid. 10 Eq. 168.

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shares. The real question is, whether the payment actually made by the Appellants before the winding-up was a valid payment or not. They were directors of the company, and they had given a personal guarantee for the balance of the company's account with their bankers; and in May, 1877, the bank had brought an action on the guarantee against these three directors, and had recovered judgment in the action. On the 6th of August, 1877, there was a meeting of the directors, at which this resolution was passed:—"In order to reduce the balance due to *Parr's Banking Company*, it is recommended that the directors do pay up the amount of their shares, as authorized by Art. 7 in Table A, and as contemplated by the company's prospectus." There is no question that at this time the company was insolvent. On the 5th of September, 1877, the three directors paid the amounts in question. The secretary had some difficulty in giving a receipt for the money, and *W. Poole* accordingly gave a receipt without having any right to do so. But the fact is not disputed that the money was paid and received on account of the shares, that it was remitted in due course to the bankers of the company and carried by them to the company's credit, thus reducing the balance against the company and relieving the directors from their guarantee. The Vice-Chancellor decided the question on this ground, that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and, therefore, that the act which they did was nugatory. But it appears to me that the question is, for whom were they trustees? It does not appear that the Vice-Chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case, namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestuis que trust* like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its

members, but they have no greater rights against the directors than against any other members of the company. They have only those statutory rights against the members which are given them in the winding-up.

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That being so, there was nothing to impose a duty on the directors not to pay a debt of the company, for which they were themselves liable, in priority to other debts, unless sect. 164 of the Act of 1862 applied, which it certainly does not in the present case. The payment to the bank was not a fraudulent preference; it was made in the ordinary course of business. It was a good payment, and could not be recovered back; therefore the directors, although they derived a collateral advantage to themselves, did not injure their *cestuis que trust*. The payment was not any breach of duty to the only persons for whom they were trustees. The appeal must therefore be allowed with costs.

Judgment, C. A. Jessel, M.R.

JAMES and BRAMWELL, L.JJ., concurred.

James and Bramwell, L.JJ.

Solicitors: *R. W. Marsland; Crowder, Anstie, & Vizard.*

In re WINCHAM SHIPBUILDING, BOILER, AND SALT COMPANY.

C. A. 1878 V.-C. B. *April* 12. C. A. *May* 29.

HALLMARK'S CASE.

Winding-up—Contributory—Director—Entry of Name on Register.

Where no share qualification is necessary, the mere fact of acting as a director of the company, and of attendance at meetings in that character, is not enough to fix a man with knowledge that his name has been entered on the share register, and with consequent liability, if he neither applied for shares nor received any notice of allotment.

There is no presumption of law that a director knows the contents of the books of the company.

The decision of *Bacon*, V.C., affirmed.

THIS was an application by the official liquidator of the *Wincham Shipbuilding, Boiler, and Salt Company, Limited*, to settle *J. B. Hallmark* on the list of contributories of the company for fifty shares.

Statement.

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HALLMARK'S CASE.

Statement.

Hallmark, who was Mayor of *Preston*, agreed to become a director of the company in March, 1877; and at a meeting of the directors held on the 24th of March, 1876, the following entry was made: "It being reported to the meeting that Councillor *Hallmark* (Mayor of *Preston*) was willing to take shares in the company and to become a director, it was resolved that his name be added to the directorate." *Hallmark* attended meetings as a director on the 18th and 22nd of April, and on the 10th of May, 1876. At this last meeting the minutes of a meeting of the 1st of May (at which *Hallmark* was not present) were read and confirmed. These minutes stated that, "608 shares having been applied for up to the present," it was resolved "that letters of allotment be at once sent to the parties, and 200 forms of allotment be printed." In making up the number of 608 shares, fifty shares alleged to have been allotted to *Hallmark* were included. *Hallmark's* name was entered in the register as the holder of fifty shares; but he swore that he never applied for or authorized any one to apply on his behalf for shares, that he received no notice or letter of allotment, and only discovered the fact from a letter written to him by *W. Poole* in October, 1877, after presentation of the winding-up petition; and further, that he consented to become director at the solicitation of *Robert Poole* (the chairman), and acted in that capacity on the distinct representation that no share qualification was necessary, inasmuch as the regulations contained in Table A. of the *Companies Act*, 1862, had been adopted as the company's articles of association. On receiving the letter of the 2nd of October, 1877 — which was in the following terms: "Knowing that you have never examined or seen the register of shareholders of this company, I consider it my duty to inform you that your name has been wrongfully inserted in such register for fifty shares, and this without any application from you or with your consent or knowledge, I give you this information in consequence of your having frequently stated to me you had no intention of taking any shares in it, and had merely, at the solicitation of the chairman of the company, consented to act as one of the directors. You can now, as a matter of course, give notice to the company to take your name off the register in respect of such shares"—*Hallmark* sent to the

directors notice that his name had been wrongfully inserted in the register in respect of fifty shares, and required them to strike it out, as he had never signed any application for shares.

C. A. 1878 HALLMARK'S CASE.

The application was heard before Vice-Chancellor *Bacon* on the 12th of April, 1878.

Sir *H. Jackson*, Q.C., and *H. B. Buckley*, for the official liquidator:— Argument.

It is not disputed that *Hallmark*, though he did not apply for shares and did not receive any letter of allotment, consented to become, and did *de facto* act as, a director of the company. He must therefore be taken to have known that he was liable to have his name placed on the register of shareholders, and also, as director, is bound by notice of the contents of the books of the company in which his name was entered for fifty shares: *Ex parte Brown* (1); *Wheatcroft's Case* (2). Not having taken any steps before the winding-up (though fixed with notice) to get his name removed, he is liable as a contributory for fifty shares.

Hemming, Q.C., and *Badcock*, for *Hallmark*, were not called on.

BACON, V.C.:— Judgment, V.-C. B.

Notwithstanding the authority of *Ex parte Brown* (3) and *Wheatcroft's Case*, I do not think the Respondent can be placed on the list. The tendency of the more recent decisions is, that in order to impute to a man a contract to take shares, something like a contract must be established. In the face of his statement that he never intended to take any shares, and that he never knew until after the commencement of the winding-up that his name was entered upon the share register, I do not think that his being a director, and attendance at meetings in that capacity, is enough to fix him with knowledge that his name was entered on the register as the holder of fifty shares. His name will be struck out from the list of contributories, and the liquidator must pay the costs of the summons.

The official liquidator appealed from this decision. The appeal was heard on the 29th of May, 1878. C. A.

(1) 19 Beav. 104. (2) 29 L. T. (N.S.) 324. (3) 19 Beav. 97.

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HALLMARK'S CASE.

H. B. Buckley (Sir *H. Jackson*, Q.C., with him), for the Appellant, cited *Ex parte Brown* (1); *Wheatcroft's Case* (2).

Hemming, Q.C., and *Badcock*, for *Hallmark*, were not called on.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is a case which in some points is exceptional. In most of the reported cases the directors were bound to take a certain number of shares, but here there was no such obligation. *Hallmark* seems never to have intended to take any shares. He applied for none, no notice of allotment of any was sent to him, and he never knew that any had been allotted to him. Under these circumstances it seems to me a matter of course not to place him on the list of contributories. There was no contract between him and the company to take shares.

The argument of the Appellant is, that the Court is empowered to infer a contract. It is contended that *Hallmark*, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case except *Ex parte Brown* which shews that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case. I am therefore of opinion that the Vice-Chancellor came to a right conclusion, and the appeal must be dismissed with costs.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. This gentleman swears that he

(1) 19 Beav. 97. (2) 29 L. T. (N.S.) 324.

never applied for shares; he did not know that any had been allotted to him; but on the 1st of May, when he was not present, somebody makes an entry on a piece of paper which contained on it two palpable falsehoods—first, that *Hallmark* had applied for fifty shares, and, secondly, that fifty shares had been allotted to him. This was done without his knowledge, and cannot be binding on him.

C. A. 1878 HALLMARK'S CASE. Judgment, C. A. James, L.J.

BRAMWELL, L.J.:—

Bramwell, L.J.

I am also of the same opinion. I will only add that it seems to me in general extremely objectionable to imply that a man had knowledge of facts contrary to the real truth. This ought only to be done where there is some duty on the part of the man to inform himself of the facts. No such duty existed in the present case.

Solicitors: *R. W. Marsland*; *Crowder, Anstie, & Vizard.*

Ex parte NORTH KENT BANK. *In re* HOLDSWORTH.

C. A. 1878 C. J. B. *May* 6. C. A. *June* 20.

Debtor's Summons—Absconding Debtor—Substituted Service—Jurisdiction of County Court—Bankruptcy Rules, 1870, *r.* 61.

A debtor, who had resided in the district of the *Greenwich* County Court, absconded, and a creditor was unable to effect personal service of a debtor's summons upon him, or to discover that he had any residence other than his old one, at which he was not to be found:—

Held (reversing the decision of *Bacon*, C.J.), that the *Greenwich* Court had jurisdiction to order substituted service of the summons.

Statement.

F. K. HOLDSWORTH was the manager of the *North Kent Bank, Limited*, at *Blackheath, Kent.* He resided at *Blyth Cottage, Lee, Kent*, within the district of the *Greenwich* County Court. On the 26th of January, 1878, he absconded, and it was then discovered that he had embezzled moneys belonging to the bank to the amount of £1000 and upwards. A warrant was issued by the Lord Mayor of *London*, and a reward of £100 was offered for *Holdsworth's* apprehension, and the reward was advertised in the

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Statement.

newspapers. On the 11th of February the bank presented a bankruptcy petition against him in the *London* Bankruptcy Court. The petition alleged that he was indebted to the bank in the sum of £1000 for money had and received by him to the use of the bank, and that he had committed an act of bankruptcy by departing out of *England* with intent to defeat and delay his creditors on or about the 26th of January. A receiver of *Holdsworth's* property was appointed under this petition, but no adjudication was made, as the evidence adduced was not, in the opinion of the Court, sufficient to prove that *Holdsworth* had left *England*. The secretary of the bank deposed that he believed that *Holdsworth* had departed out of *England* with intent to defeat and delay his creditors; that since the 26th of January he had not returned to the bank to resume his ordinary duties, and that he had not since that day been to his dwelling-house, *Blyth Cottage*. The furniture at *Blyth Cottage* was claimed by an execution creditor, and on the 15th of February an order was made that the receiver should be at liberty to sell the furniture by auction, and that he should pay the proceeds of sale into Court, without prejudice to the claim of the execution creditor. On the 13th of April the bank issued a debtor's summons for £1000 against *Holdsworth* in the *Greenwich* County Court. The solicitors of the bank endeavoured to serve the summons upon him personally, but were unable to discover where he was. On the 16th of April the bank applied to the Court for an order directing substituted service of the debtor's summons by publication in the *Gazette* and a local newspaper. In support of the application *A. H. Hutchings*, a clerk to the bank's solicitors, deposed that on the 5th of April particulars of the bank's demand were sent by post, addressed to *Holdsworth* at *Blyth Cottage*. *Hutchings* also stated that he was instructed by his principals to serve *Holdsworth* with a sealed copy of the debtor's summons, and that for that purpose he went, on the 13th of April, to *Blyth Cottage*, but found the house untenanted, and no person answered the door. He afterwards made numerous inquiries at houses in the neighbourhood, and was informed that *Holdsworth* had absconded, and had not since been seen or heard of. *W. Jones*, another clerk to the bank's solicitors, deposed that on the 15th of February he called at *Blyth Cottage* for the purpose

Statement.

of ascertaining, if possible, his then address. He then saw one *Charles Champion*, who informed him that he was coachman and gardener to *Holdsworth*, and told him that the last time *Holdsworth* was at his residence was on the morning of the 26th of January; and *Jones* added that he had frequently seen the police officer who was intrusted with the warrant for *Holdsworth's* apprehension, and that the officer had always informed him that he had been unable to ascertain where *Holdsworth* was residing or where he could be found.

On the 17th of April the Registrar of the County Court, acting as Judge, refused the application for substituted service, on the ground that he was not satisfied that *Holdsworth* was keeping out of the way to avoid service of the summons, but that he was probably doing so only to avoid being arrested under the warrant.

The Bank appealed to the Chief Judge. The appeal was heard on the 6th of May, 1878.

Rolland, for the Appellants, cited *In re Williams* (1).

Judgment, C. J. B.

BACON, C.J.:—

I am of opinion that the order asked for cannot be made.

The jurisdiction of the Court must be exercised by the Court of the district in which the debtor happens to be. On the 26th of January the debtor was at *Lee*, in *Kent*. Upon that day he went away—he disappeared—vanished—and has never been heard of since. Wherever the debtor has gone to, if in this country, the jurisdiction in bankruptcy will attach to him, but it must be exercised in the place in which he is. If he has gone into some other part of *England*, you must find him. If you cannot find him, another course is open; but you cannot, by means of a summons issued subsequently to the date when he absconded, make him a bankrupt within the district in which he was residing when he absconded.

I think the Registrar was right; and I can make no order.

C. A.

From this decision the Bank appealed. The appeal was heard on the 20th of June, 1878.

(1) Law Rep. 8 Ch. 690.

C. A.

1878

Ex parte NORTH KENT BANK.

In re HOLDSWORTH.

Argument.

Winslow, Q.C., and *Rolland*, for the Appellants:—

Rule 61 says that, "if personal service cannot be effected, the Court may grant extension of the time for service, or, if the Court is satisfied by affidavit that the debtor is keeping out of the way to avoid such service, it may order service to be made by delivery of the summons or petition to some adult inmate at his usual or last known place of residence or business." This implies that the debtor need not be then actually resident within the district of the Court. If a man goes away to avoid arrest, he must be taken to intend the necessary consequences of his own act, and to intend to avoid every kind of process which his creditor might adopt.

[JAMES, L.J.:—The motive does not signify.]

In re Williams (1) shews that if a man leaves the district of a Court in order to avoid its process, its jurisdiction over him continues.

[JAMES, L.J.:—Suppose a man was always running up and down the country?]

Lord Justice *Mellish* said in *In re Williams* that a man cannot avoid the bankruptcy law by residing nowhere, and that, if a debtor had no other residence, the place where he was actually sleeping would for this purpose be his residence.

[BRETT, L.J.:—Does not your argument go to shew that any other Court would be as good as the *Greenwich* Court?]

No, for the debtor's last known place of residence was within the district of the *Greenwich* Court.

[They were stopped by the Court.]

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I think we may make the order asked for. The debtor was resident within the district of the *Greenwich* County Court, and was subject to its jurisdiction. He then ran away, and it does not appear that he has now any residence whatever other than his original residence. Having regard to the words "usual or last known place of residence" in rule 61, I think it must have been

(1) Law Rep. 8 Ch. 690.

intended that in every case some Court of Bankruptcy should have jurisdiction over the debtor. In the present case the only Court which can have jurisdiction is that Court which had jurisdiction over him where he last resided.

Brett and Cotton, L.JJ., concurred.

Solicitors for Bank: *Lewis, Munns, & Longden.*

ATTREE *v.* HAWE.

[1875 A. 10.]

Charitable Uses—9 *Geo.* 2, *c.* 36—*Debenture Stock*—*Interest in Land.*

Held, by the Court of Appeal, reversing the decision of *Hall*, V.C., that debenture stock created under the provisions of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), Part III., does not give the holder an interest in land within the meaning of 9 Geo. 2, c. 36, and may therefore be given by will for charitable purposes.

And, *semble*, the same rule applies to debentures as to debenture stock.

Ashton v. *Lord Langdale* (1) and *Chandler* v. *Howell* (2) overruled.

Statement.

JOHN BATES, by will dated the 11th of August, 1873, gave to the Corporation of *Brighton* £9000 debenture stock of the *Midland Railway* and £3000 New £3 per Cents., for certain charitable purposes. He also bequeathed £1200 *Midland* debenture stock to the feoffees of *Market Harborough* for charitable purposes. He also bequeathed £1000 debenture stock of the *Great Northern Railway* to the *Brighton* School Board for charitable purposes.

These debenture stocks were stocks created under the provisions of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), Part III.

A decree having been made for the administration of the testator's personal estate, the question came to be decided on the hearing for further consideration before Vice-Chancellor *Hall*, on the 17th of November, 1877, whether stock of this description could be given by will for charitable purposes.

(1) 4 De G. & Sm. 402. (2) 4 Ch. D. 651.

C. A. 1878

ATTREE v. HAWE.

Argument.

W. Pearson, Q.C., and *Renshaw*, for the Plaintiff, the executor of the will.

Dickinson, Q.C., and *Bunting*, for the next of kin of the testator.

Eddis, Q.C., *H. Greenwood*, and *Davies*, for the residuary legatee.

Morgan, Q.C., and *Langley*, for the feoffees of *Market Harborough*:—

This debenture stock is pure personalty, and can be bequeathed for charitable purposes. It was created and issued under the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), s. 22, and by sect. 23 it is a charge upon the undertaking, transmissible and transferable in the same manner as other stock of the company, and it has in all other respects the incidents of personal estate. The distinction between this case and *Chandler* v. *Howell* (1) is that there the security was a mortgage by which an improvement company actually assigned the works, rents, and rates authorized by their Act, the assignors were not a trading company; and there was a direct interest in land of which the assignee could possess himself; and *Thornton* v. *Kempson* (2) was a similar case. Here the security is debenture stock of a joint stock trading company of the same nature as their other shares or stock, only having priority over them; it is merely a charge upon the undertaking; that is, upon the fruit and not upon the tree, and the holder of it cannot possess himself of anything, nor can he stop the undertaking; he is merely entitled to the appointment of a receiver: *Gardner* v. *London, Chatham, and Dover Railway Company* (3). The authorities shew that debentures of this character are not within the *Statute of Mortmain*: *Myers* v. *Perigal* (4); *Ashton* v. *Lord Langdale* (5); *Walker* v. *Milne* (6). And in the recent case of *Holdsworth* v. *Davenport* (7), Vice-Chancellor *Malins*, in deciding that a debenture of a waterworks company which charged the undertaking was not an interest in land within the statute, commented

(1) 4 Ch. D. 651.
(2) Kay, 592.
(3) Law Rep. 2 Ch. 201.
(4) 16 Sim. 533; 2 D. M. & G. 599.
(5) 4 De G. & Sm. 402.
(6) 11 Beav. 507.
(7) 3 Ch. D. 185.

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upon the unreasonableness of the contention, that although shares in a company were admittedly not such an interest, a debenture of the same company, which merely amounted to an assignment of those shares, was such an interest. The case is really stronger with regard to debenture stock.

C. A. 1878 ATTREE v. HAWE. Argument.

[They referred to *Wickham* v. *New Brunswick and Canada Railway Company* (1).]

Millar, for the Corporation of *Brighton* :—

There is no analogy between the word "tolls" used in the old mortgages of turnpike tolls, and the same word as applied to the earnings of a railway company. The one was a rate for the use of land, the other is money paid to the company as carriers, and there is no inconsistency in holding that a security which in the one instance gives an interest in land, does not do so in the other. Moreover, the trustees of charities are, under the *Charitable Funds Investment Act* (33 & 34 Vict. c. 34), expressly empowered to invest their moneys on real securities, without being deemed thereby to have acquired land within the *Statute of Mortmain*; and there is great inconsistency in the contention that they cannot hold debenture stock without infringing that statute.

HALL, V.C.:— Judgment, V.-C. H.

I have considered this case since Saturday, and I have looked again into the authorities which I examined not long ago in the case of *Chandler* v. *Howell* (2), and it appears to me that I really cannot distinguish the present case from those cases on which I then founded my judgment. This debenture stock is stock, the nature of which is regulated by the *Companies Clauses Act*, 1863. I have considered all the sections in Part III. of this Act. The 22nd section provides for the creation and issue of debenture stock, and it describes it as "stock"; it is to be raised on mortgage or bond. [His Lordship read the section down to the words "have power to raise on mortgage or bond."] This, then, is a creation by bond or mortgage of stock to be called debenture stock, and that stock by the 23rd section is described thus:—[His Lordship read the 23rd section.] That does not appear to me to do more

(1) Law Rep. 1 P. C. 64. (2) 4 Ch. D. 651.

C. A. 1878 ATTREE v. HAWE. Judgment, V.-C. H.

than provide for the transmissibility of the stock, that is to say, it is to go like ordinary shares and stock of the company, to the legal personal representative, and in all other respects it is to have the incidents of personal estate. But that does not touch the question which has to be determined in this case, namely, whether it is to be taken as pure personal estate by reason of the circumstance that ordinary shares and stocks have been held and considered to be in the nature of pure personal estate. I do not think this Act goes far enough to effectuate that. The words upon a fair construction do not amount to that. The holders of debenture stock, by the 31st section, are not to rank as being holders of stock, that is, of ordinary stock, but are to be considered as entitled to the rights and powers of mortgagees of the undertaking other than the right to require payment of the principal money paid up in respect of the debenture stock. The 24th section does not appear to me to assist the determination of the present case. The 25th section provides for the appointment of a receiver when the interest has been in arrear for a certain time; and by the 26th section that receiver is to be a receiver of the whole, or a competent part of the tolls or sums liable to the payment of the interest. So the position of a holder of debenture stock is this. He is a person who may obtain a receiver of tolls or sums liable to the payment of his interest, and these tolls or sums become liable by reason of the charge upon the undertaking which is given by sect. 23. That charge carries with it the right to have a receiver of certain tolls or sums; that is to say, in so many words, the revenue arising from the undertaking. That being the effect of this Act of Parliament, with respect to the cases which were referred to in my judgment in *Chandler* v. *Howell* (1), I do not propose to go into those cases again, because I do not believe it will be said or considered that in the course of my examination of them I did not correctly and sufficiently refer to the particulars of the several cases. I may observe that in *Walker* v. *Milne* (2) the judgment of Lord *Langdale* no doubt went the other way, but in *Ashton* v. *Lord Langdale* (3), Vice-Chancellor *Knight Bruce* respectfully declined to follow that case. I need not refer to any other authorities upon

(1) 4 Ch. D. 651. (2) 11 Beav. 507.
(3) 4 De G. & Sm. 402.

the case generally, but I will merely call attention to one modern case, that of *Alexander* v. *Brame* (1). That was a mortgage in which the late Master of the Rolls held that debentures of the commissioners of a dock made under an Act of Parliament, and in the form of an assignment of the duties arising by virtue of the Act, were within the *Mortmain Act*, following the case of *Ashton* v. *Lord Longdale* (2). There was not there an assignment of anything but what might be properly described as the fruits of the concern. It is said that there is a distinction between a charge upon the fruits and upon the corpus, and that was the real argument before me. The cases have been divided into two classes, one in which the thing itself producing the fruit was affected to be charged, and the other in which only the fruit of the thing was the subject of charge, in which latter case it was contended that such was not an interest in land within the Act. It seems to me that such a distinction is unsound both in reason and in principle. If you charge the fruit you charge the rents and profits. Although you may say you will not charge, and although you may be prohibited from selling the land, still you are getting within the mischief of the *Mortmain Act*. You are still getting an interest in land which the Act does not intend you to get. For although it is true that the 1st section does not in so many words include all interests in land, yet the 3rd section does, and it has always been considered that in construing sect. 1, you must have regard to the provisions of sect. 3. There is a case before Sir *William Grant*, where he observed that he could not make out any solid distinction between the case before him and the earlier cases bearing upon the construction of those two sections; in like manner it appears to me that there is no solid distinction between the present case and the cases to which I have referred. Mr. *Millar* contended that, in fact, a railway company is more in the nature of a carrying company, and therefore ought not to be considered as a company whose property is land. Many of the cases which have arisen have had that element of property being mixed in its nature; but it has always been said that they cannot be distinguished on that ground so long as they are within the mischief of the Act. That was Sir *William Grant's* language in the case of

(1) 30 Beav. 153. (2) 4 De G. & Sm. 402.

C. A. 1878 ATTREE v. HAWE. Judgment, V.-C. H.

Finch v. *Squire* (1). In the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (2), the observations on the meaning of the word "undertaking" and the decision itself were upon an entirely different question, and not at all upon the construction of the *Mortmain Act*, and I cannot, therefore, consider that case to be an authority, displacing the decisions which were referred to by me in *Chandler* v. *Howell* (3), and in particular the case before Vice-Chancellor *Knight Bruce*, of *Ashton* v. *Lord Langdale* (4), which is on all-fours with the present case. I must, therefore, again follow the cases referred to, and having considered the present case in all its bearings, I am of opinion that the debenture stocks in question are an interest in land within the *Mortmain Act*, and these bequests consequently void.

C. A.

The Corporation of *Brighton* appealed. The appeal was heard on the 5th of June, 1878.

Argument.

Southgate, Q.C., and *Millar*, for the Appellants:—

Ordinary shares in a waterworks company are not an interest in land within the *Mortmain Act*: *Bligh* v. *Brent* (5); nor shares in a railway company: *Duncuft* v. *Albrecht* (6); *Bradley* v. *Holdsworth* (7); *Taylor* v. *Linley* (8); nor shares in a land company: *Entwistle* v. *Davis* (9). Debentures were created by the *Companies Clauses Act*, 8 Vict. c. 16, and in form they purport to assign the "undertaking." It was decided in *Doe* v. *St. Helens Railway Company* (10) that a debenture holder could not maintain ejectment; and it is shewn by *Gardner* v. *London, Chatham, and Dover Railway Company* that a debenture holder has in fact only a charge on the net profits of the undertaking. It was accordingly held in *In re Mitchell's Estate* (11) that a debenture was pure personalty within the *Mortmain Act*. Debenture stock was created by 26 & 27 Vict. c. 118; and looking at the cases as to debentures, it is clear that the interest of a holder of debenture

(1) 10 Ves. 41.
(2) Law Rep. 2 Ch. 201.
(3) 4 Ch. D. 651.
(4) 4 De G. & Sm. 402.
(5) 2 Y. & C. Ex. 268.
(6) 12 Sim. 189.
(7) 3 M. & W. 422.
(8) 2 D. F. & J. 84.
(9) Law Rep. 4 Eq. 272.
(10) 2 Q. B. 364.
(11) 6 Ch. D. 655.

stock is no more an interest in land than that of an ordinary shareholder; he merely has a preferential right to the profits. *Cluff* v. *Cluff* (1) is against us, but *Holdsworth* v. *Davenport* (2) and *In re Mitchell's Estate* (3), as to debentures, are in our favour. *Chandler* v. *Howell* (4) might well stand with a reversal of the present decision.

Dickinson, Q.C., and *Bunting*, *Eddis*, Q.C., *H. Greenwood*, and *Davies*, *contra*:—

There has been a confusion made in some of the cases between the interests of the shareholders and the interest of the company. *Holdsworth* v. *Davenport* is an instance of this, for the Vice-Chancellor assimilates a debenture to a mortgage of shares, to which it has no resemblance. A mortgage of turnpike tolls has been held within the *Mortmain Act*: *Knapp* v. *Williams* (5). Sect. 3 of the Act refers to charges and incumbrances affecting land. Now under 26 & 27 Vict. c. 118, s. 31, the holders of debenture stock have the rights and powers of mortgagees of the undertaking other than the right to require repayment of the principal money. Their position is precisely similar to that of mortgagees of tolls, they can exercise rights over land by virtue of their security.

[JAMES, L.J.:—If a testator charges his real estate with his debts, is each of the debts an interest in land?]

Probably not; but a legacy charged on land is an interest in land within the *Mortmain Act*: *Brook* v. *Bradley* (6). In *Finch* v. *Squire* (7) a security on poor rates and county rates was held to be within the Act. *Thornton* v. *Kempson* (8) is similar. In *Myers* v. *Perigal* (9) shares in a joint stock bank holding land were held not to be within the Act; and the same was held in *Ashton* v. *Lord Langdale* (10), but in the same case mortgages of the undertakings and the tolls were held to be within the Act; and in *In re Langham's Trust* (11) the same distinction was taken.

(1) 2 Ch. D. 222.
(2) 3 Ch. D. 185.
(3) 6 Ch. D. 655.
(4) 4 Ch. D. 651.
(5) 4 Ves. 430, n.
(6) Law Rep. 3 Ch. 672.
(7) 10 Ves. 41.
(8) Kay, 592.
(9) 16 Sim. 533; 2 D. M. & G. 599.
(10) 4 De G. & Sm. 402.
(11) 10 Hare, 446.

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C. A. 1878 ATTREE v. HAWE. Argument.

Edwards v. *Hall* (1) only applies to shares, and *Walker* v. *Milne* (2) is directly overruled by *Ashton* v. *Lord Langdale* (3). The language of *Gardner* v. *London, Chatham, and Dover Railway Company* (4), which is explained by *Bowen* v. *Brecon Railway Company* (5), if examined shews that Lord *Langdale* went too far in saying that a security on the property of a continuing business was not a charge on land.

Southgate, in reply:—

There is no authority that a security which only gives a right to a share of the profits of a partnership is within the Act. Debenture stock is nothing but a perpetual annuity payable out of the profits.

Judgment, C. A.

July 3. JAMES, L.J., now delivered the judgment of the Court (*Jessel,* M.R., and *James, Baggallay,* and *Bramwell,* L.JJ.):—

This is an appeal from the Vice-Chancellor *Hall's* decision that debenture stock of the *Midland Railway Company* is subject to the prohibitions of the statute of Geo. 2 restraining gifts of land to charitable uses. This decision is in direct conflict with a recent decision of the Vice-Chancellor *Malins* in *Holdsworth* v. *Davenport* (6). And assuming the case of debenture stock to be the same for this purpose with the debentures formerly given by railway companies and other public bodies (which will require to be considered), there are two conflicting decisions, one by Lord *Langdale* holding that they were not, and one by the Vice-Chancellor *Knight Bruce* holding that they were, within the prohibition. Having to deal with this conflict of authority, it is well to refer to the Act itself and a little to the history of the decisions upon it.

The Act recites as follows: "Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws as prejudicial to and against the common utility, nevertheless this

(1) 6 D. M. & G. 74.
(2) 11 Beav. 507.
(3) 4 De G. & Sm. 402.
(4) Law Rep. 2 Ch. 201.
(5) Ibid. 3 Eq. 541.
(6) 3 Ch. D. 185.

public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons or by other persons to uses called charitable uses to take place after their deaths to the disherison of their lawful heirs."

It had from the earliest times been the policy of the common law as interpreted by the Judges to discourage the inalienability of land, and this altogether irrespective of the peculiar mischiefs supposed to arise from the vesting of lands in mortmain, which deprived the Sovereign and the lords of the profitable incidents of feudal tenures. And this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way—that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification), and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent, viz., to prevent the increase of inalienable land through the weakness of or practices upon dying persons, or through posthumous charity. And upon examination of the enactments it will be found that the Act is in entire consistency with the recital. In the Act there is no prohibition of gifts of land by deeds *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property. But the Act does in the most comprehensive terms forbid any such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same. At first sight it may seem that the enactment has gone far beyond the scope of the recited object, for it extends, as has always been held, even to a pecuniary legacy, so far as it is payable out of land or any charge or incumbrance on land. But it will be found on examination that all the comprehensive words in the prohibitory

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enactment were in truth necessary or useful to prevent evasions and devices contrary to the main intent of the Act, although from the impossibility of legislating for every particular case they have been found to apply in a great many cases to gifts which were neither in effect or intention contrary to the real object of the Legislature. No interest in land can be given, because under colour of a gift of a mere pecuniary interest the land itself could easily be given. Let a perpetual annuity of £100 a year be given out of lands worth £50, the heir of course would let the annuitant take the lands themselves. A charge or incumbrance of £10,000 on lands worth £5000 would be an easy practical mode of giving the lands themselves. And take the strongest case of apparently a mere legacy of a sum of money out of personal estate. A testator whose whole assets were worth only £5000 gives a legacy of £10,000 to charitable uses, and makes some official or other person interested in the charity his executor and residuary legatee. The result would be that the charity would get the assets in specie, which might include long terms of years in land and mortgages, and which by foreclosure or long possession would become the land itself. There is nothing really in the Act which has so far gone, or at all gone, beyond its recited object as to preclude the application of the rule of construction, the rule of common sense, that you are to construe the enacting part by the light of the recital of its object. Accordingly, it has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which or on which it is carried on, or although it may have amongst its assets any amount of mortgages, charges, or incumbrances on land. And shares in railways, shares in other public companies of a like nature, are now universally admitted not to be obnoxious to the prohibition of the Act. It was never supposed that a bond debt or other specialty binding the heir was within the Act, although its very object was to affect the real estate of the obligor. The personal estate of a testator is not for this purpose affected by the fact that an item in it is a share in the unascertained and unadministered assets, real and personal, of another testator.

22 Ch D 213.

Now how, dealing with the matter on principle, does the case

of a railway debenture stand? Previously to the cases about to be mentioned, it was very difficult to say that it was not a charge or incumbrance on land within the words of the statute. There are in this country a great many railways which are private and individual property. All, or almost all, the Canal Acts, passed about the end of the last century and the beginning of this, contained powers enabling the proprietors of any mine or work within a certain distance of the canal to make a railway or tramway communication with the canal, the same to be open to the public on the payment of the same tolls as were taken by the canal itself. Now, it is clear that a mortgage or a debenture, in the very words of the ordinary railway debenture given by the owner of such a railway would, in fact, be precisely similar to a mortgage on land. The mortgagee could, by himself, or at all events by a receiver, get into the actual possession of the line of railway, and, if the incumbrance were too heavy to be redeemed, that possession would be perpetual. The Vice-Chancellor *Knight Bruce*, who was, as I happen to know, very familiar with that class of railway property to which I have referred, evidently, in *Ashton* v. *Lord Langdale* (1), considered that the debenture given by the corporate body of its undertaking and tolls was, in legal effect and operation, the same as a similar charge on a private owner's railway would be, and on that assumption it was impossible for him to arrive at any other conclusion than the one he did. On the other hand, Lord *Langdale* must have thought that there was something essentially different between the charge created by a private owner of a railway and a charge made under statutory authority by a Parliamentary body established and empowered to make, maintain, and manage for public convenience a great public highway, the maintenance and working of which may be of vital importance to the State itself; and he held, accordingly, in *Walker* v. *Milne* (2), that the holder of a railway debenture issued by such a body did not acquire a charge on land, any more than a shareholder in the company acquired an interest in the land. The nature of such a debenture came under the consideration of the Court of Queen's Bench in *Doe* v. *St. Helens Railway Company* (3), and of the Court of Exchequer in *Hart* v. *Eastern Union Railway*

(1) 4 De G. & Sm. 402. (2) 11 Beav. 507. (3) 2 Q. B. 364.

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Company (1), by which it was established that the debenture, wide as its words were, did not pass the soil and did not pass the rolling stock of the company. And, on the same principle, it was held in *Gardner* v. *London, Chatham, and Dover Railway Company* (2), that a debenture-holder could not take or touch the soil of the lands required and used for the actual working of the railway, nor the soil of any surplus lands which had been acquired, but were not required for actual use, nor the rolling stock; nor could he, by himself or his receiver, get the management of the line, nor do anything in derogation of the authority of the statutory managers, who could not delegate to any one else their powers, nor shift their responsibility. The words of the security were subordinated to the essential nature of the undertaking, and limited so as not to extend to the very destruction of the thing the maintenance of which in perpetuity was the intent and object of the Legislature; and the result of that case was that the receiver, whose appointment the debenture-holders were entitled to have made, was in truth nothing but a cashier or treasurer imposed on the company. He could not appoint or discharge a ticket-taker or a railway porter or an engine-driver or plate-layer. Every servant of the railway would still be under the directors, and their wages and salaries fixed by them. All purchases and contracts for the use of the railway would be made by them. The receiver, as treasurer, would take all the moneys received by every officer of the company, would thereout pay all outgoings on the warrant of the directors, the statutory managers of the concern, and would then apply the net surplus, being the net earnings of the business, in discharge of his immediate principals, the debenture-holders. His functions would be, except as to the net surplus, neither more nor less than those of a banker appointed to receive all the moneys of a large brewery, and to pay all cheques of the persons properly authorized to draw on the account. Now, with the light thrown by these cases on the real legal operation and effect of a railway debenture, it is impossible not to prefer the decision of Lord *Langdale* in *Walker* v. *Milne* (3) to the decision of Vice-Chancellor *Knight Bruce* in *Ashton* v. *Lord Langdale* (4).

(1) 7 Ex. 246.
(2) Law Rep. 2 Ch. 201.
(3) 11 Beav. 507.
(4) 4 De G. & Sm. 402.

But the case before us is really not that of a debenture, but of debenture stock. It seems to be called debenture stock, *lucus a non lucendo*, because it is anything but a debenture. There is no debt, except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock, on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of *England*. And the whole of the rights of a stockholder depend on the Act of Parliament authorizing railways and other bodies to create such a stock. The 22nd section of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), so far as is material, is as follows:—The company may, from time to time, raise money by the creation and issue, at such times, on such terms, subject to such conditions, and with such rights and privileges as the company thinks fit, of stock, and may attach to the stock so created such fixed and perpetual preferential interest as it may think fit, not exceeding the prescribed limit. By the 23rd section it is directed that the debenture stock, with the interest thereon, shall be a charge on the undertaking prior to all shares and stock of the company, and shall be transmissible and transferable like other stock of the company, and shall in all other respects have the incidents of personal estate. By the 24th section, it is provided that the interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, ordinary, preference, or guaranteed. So far it is quite clear that the stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances, to take possession of a single item of the property of the company in specie, whether real or chattel.

Now, is any difference made in this respect by the provisions as to the appointment of a receiver? The receiver, when appointed,

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is to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, and, after payment of interest on the mortgages and bonds of the company, to distribute the money rateably amongst the proprietors of debenture stock. In *England* the receiver is to be appointed by two Justices of the Peace, on the application of a prescribed proportion of stock proprietors. It is difficult to conceive how this could, directly or indirectly, tend to make any land inalienable or to give to the stockholder, either immediately or as the ultimate result of any amount of insolvency, the possession or the right to the possession of any portion of the property of the company, which must remain legally and equitably in the possession of the company and under the absolute control and dominion of the statutory body of managers. The expression, no doubt, is "tolls or sums," but it is tolls or sums liable to the payment of the interest. It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county. But with a railway company this is impossible. The actual tolls taken, whether from other carriers or from freighters, or passengers, must, from the very nature of the case, remain under the dominion of the directors, to enable them to do what is required for the preservation of the road and the safety of life and property. The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. Again, there is by the Act a special machinery for the summary appointment of a receiver; but, without that special machinery, a person having a charge on the net earnings of such a body could have got a receiver of those net earnings, if the managing body were to disregard its duty of applying them exclusively to the payment of the debenture stock interest. I apprehend that, even with regard to preference shares properly so called, if the directors, acting in the interest of a majority of ordinary shareholders, were to misapply or not to apply such net earnings, the Court would have no difficulty in appointing a receiver to receive and properly apply the same.

By the 31st section it is, no doubt, provided that, in all respects

not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not powers to take the land or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers.

The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is.

Solicitors: *Clarke & Calkin; Singleton & Tattershall; Tilleard, Godden, & Holme.*

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VAVASSEUR *v.* KRUPP.

[1877 V. 50.]

Foreign Sovereign—Jurisdiction—Submission—Injunction—Property—Patent.

The Court has no jurisdiction to prevent a foreign sovereign from removing his property in this country.

A foreign sovereign who, for the purpose of obtaining his property, submits to be made a Defendant in an action, does not thereby lose his rights.

There is a right of property in an article made in infringement of a patent although the Court would order the article to be destroyed.

A foreign sovereign bought in *Germany* shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a Defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells.

Statement.

JOSIAH VAVASSEUR, the Plaintiff in this case, had brought an action against *F. Krupp*, of *Essen*, in *Germany*, *Alfred Longs-*

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den, his agent in *England*, and *Ahrens & Co.*, described as agents for the Government of *Japan*, claiming an injunction and damages for the infringement of the Plaintiff's patent for making shells and other projectiles. The shells in question had been made at *Essen*, in *Germany*, had been there bought for the Government of *Japan*, had been brought to this country and landed here in order to be put on board three ships of war which were being built here for the Government of *Japan*, and to be used as ammunition for the guns of those ships.

On the 18th of January, 1878, an injunction was, without prejudice to any question, granted, restraining the Defendants and the owners of the wharf where the shells lay from selling or delivering the shells to the Government of *Japan*, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles.

On the 11th of May an application to the Court was made on behalf of the Mikado of *Japan* and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that if and so far as might be necessary the Mikado and his Envoy should for the purposes of making and being heard upon such application be added as Defendants in the suit. Upon this application an order was made by the Master of the Rolls that on the Mikado by his counsel submitting to the jurisdiction of this Court and desiring to be made a Defendant, and on payment into Court by the Mikado of £100 as security for costs, the name of the Mikado be added as a party Defendant in the action.

Notice of motion was then given on the part of the Mikado that the injunction might be dissolved, and that the Mikado might be at liberty to take possession, and remove out of the jurisdiction of the Court the shells in question the property of his Imperial Majesty.

The motion was heard before the Master of the Rolls on the 29th of June.

Aston, Q.C., *Davey*, Q.C., and *Everitt*, for the Plaintiff.

Fooks, Q.C., and *Cozens-Hardy*, for the Mikado.

Chitty, Q.C., *Cookson*, Q.C., *Macrory*, and *Medd*, for the Defendants. C. A. 1878 VAVASSEUR v. KRUPP.

JESSEL, M.R.:— Judgment, M.R.

The Plaintiff, entertaining not unnaturally the strongest objection to Mr. *Krupp* manufacturing these shells without paying any royalty, has undertaken to prevent persons in this country from making any use of or removing these shells.

Then the Mikado came in and said, "I am a foreign sovereign, yet I will submit to the jurisdiction for the purpose of empowering the Court to make an order; but I say that you cannot interfere with my taking away these shells under these circumstances brought to this country." I think that he is right; and then comes the question what the form of the order should be. Now the Defendants say, and I think they say rightly, the order did not prevent the Mikado from taking the shells away; but when the Mikado's agent applies for them, the persons liable under the injunction say they do not wish to run any risk, because if it was afterwards decided that allowing the Mikado to take the shells was a breach of the injunction, they might be exposed to loss. They therefore would not allow the Mikado to take the shells away without obtaining the decision of the Court; and the object of this motion is to obtain that decision, and nothing else. I propose to make an order that, without prejudice to any question, notwithstanding the injunction, the Mikado shall be at liberty to take out of the jurisdiction the shells which belong to him.

The Plaintiff expressed his intention at once to appeal, and the appeal came on at once for hearing, on the 3rd of July, without any order having been drawn up or any formal notice of appeal having been given. C. A.

Aston, Q.C., *Davey*, Q.C., and *Everitt*, for the Plaintiff:— Argument.

These shells may be the property of a foreign sovereign, but they are now in this country, and he has submitted to the jurisdiction of the Court, and must defend the action and take the consequences like any one else. If a foreign sovereign allows his property to come here and his agents here give rights over it to

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third parties, the Court must deal with the property as if it was ordinary property: *Gladstone* v. *Musurus Bey* (1). In the other cases, such as *Hullett* v. *King of Spain* (2), the sovereign had not submitted to the jurisdiction. But there is no property in these shells, for if an article made in infringement of a patent is brought into this country, the Court will order it to be destroyed.

There is a difference between what is done by a sovereign and what is done by his agents: *Dixon* v. *London Small Arms Company* (3). No doubt a foreign sovereign cannot be sued, but where his property is within the jurisdiction there is no reason why the Court should refrain from adjudicating upon it. If the Court has no jurisdiction, why is this application made?

[*Fooks*, Q.C.:—The Defendants have had this injunction served on them, and are anxious not to do anything which might be held wrong.]

Fooks, Q.C., and *Cozens-Hardy*, for the Mikado, were not called upon.

Chitty, Q.C., *Cookson*, Q.C., *Macrory*, and *Medd*, appeared for the Defendants.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that this attempt on the part of the Plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I have ever heard of as made in any Court in this country.

It is an undoubted and admitted fact that the Mikado of *Japan*, who is a sovereign prince, bought in *Germany* a certain quantity of shells, which shells were lawfully made in *Germany*, although they were, as alleged, made upon the same principle as something which is the subject of a patent in this country. Those shells were bought by the Mikado for the purpose of his government. He brought them into this country on the way to *Japan*, and he asks to be allowed to remove them from this country, that is to say, he asks that he shall not, by reason of something which was

(1) 1 H. & M. 495. (2) 2 Bli. (N.S.) 31.
(3) Law Rep. 10 Q. B. 130.

done between the Plaintiff and some other persons, be interfered with in his removal of them to his own country. It seems to me that to refuse him that leave would be a very dangerous proceeding. If a tribunal of any foreign country were to deal with the ammunition of a British man of war under those circumstances, or refuse to permit the captain of a British man of war to remove his ammunition and shells, or anything else, I think that our country would consider it a very serious matter, and possibly demand reparation.

The objection made is this. The Plaintiff says, "True it is that these shells were your property; you had brought them to this country *in transitu* to *Japan*, and you had no doubt a right so to bring them. But some persons in this country, either with or without your authority—with your authority it may be, but at all events having possession of these things as your agents—were minded to make, and did make, a use of these shells which was inconsistent with our patent, that is to say, they were making a profitable use of them." If they were doing so, then they are liable in an action for damages, and the Plaintiff may recover any damages that he may be entitled to. But that does not interfere with the rights of the sovereign of *Japan*, who now asks to be allowed to take his property. It was his property. It is now in the shape in which it was when he lawfully bought it in *Germany*, where it was lawfully made, and he asks to be allowed to take it out of this country in that shape.

I cannot conceive it possible how any doubt could arise or could be suggested as to the right of the Mikado to do this. I suppose that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, "It is my public property, and I ask you for it." That seems to me to be the whole of the case.

It is, however, said that the Mikado has submitted to the jurisdiction. No doubt he submitted to the jurisdiction, but in this way only, and for this purpose only. In certain circumstances (which it is not necessary for us now to inquire into) Mr. *Ahrens* and others were ordered by a Court of municipal jurisdiction not to

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deliver certain shells and other things to the Mikado, that is to say, treating them as property, these persons were ordered not to deliver them to the Mikado, but entirely without prejudice. It could never be supposed that that order was to deprive him of any right or property which he had in them. Then when he himself applied to these persons and said, "Give me my property, let me take my property out of this country to my own country," they said, "We do not claim the property, we know it is yours, but there is an injunction of this Court, and we may be liable to punishment by this Court if we give you up your property." Upon which the Mikado, for the purpose of making an application to relieve his own property from a fetter which had been put upon it (I think inadvertently, if I may venture to say so), by the injunction of the Court, does come and say, "I will submit to the jurisdiction of the Court," which means "I will submit to the jurisdiction of the Court as to discovery, as to process, and as to costs." He never meant "I shall submit my public property to be dealt with by a Court of municipal jurisdiction in another country, and in violation of my rights." The whole effect of that proceeding was that he made himself a suitor liable to the ordinary consequences, so far as they can be enforced against a sovereign as to costs and otherwise, and in that character he made a deposit of £100 to provide for the costs of the proceedings. The order he obtained does not prevent his saying, as is the truth, "This is my property, it was lawfully bought by me and paid for by me, and it is public property. Whether anybody else has done anything right or wrong with it, is a question with which I have nothing to do. No Court of municipal jurisdiction has any right to interfere with my property, and be good enough to remove your hands from it." The Master of the Rolls, who granted the injunction, and heard the whole matter, as soon as he learnt what was the state of things, said of course that he could not keep hands on a property which he had no right to interfere with; and he made the order which is complained of.

Brett, L.J.

BRETT, L.J.:—

It does not seem to me that in this case there is any fact whatever in dispute. These shells were made by *Krupp* at *Essen*.

That was no infringement of the Plaintiff's patent. In *Germany* they were sold to the Mikado and paid for by the agents of the Mikado. None of these facts are in dispute; and this purchase and sale was a perfectly lawful purchase and sale. The Mikado had three ships of war building in this country, and he desired that these shells should be sent to this country and put on board these ships. They were sent to this country by the order and by the authority of the Mikado, through *Ahrens & Co.* They were brought into this country, and they were deposited on a wharf. The Plaintiff then finding these shells in this country, and finding, as he alleges, that they were made according to the process of his patent, asserts that the bringing them into this country by *Ahrens & Co.* is an infringement of his patent by them; and thereupon he brings an action against *Ahrens & Co.* for the infringement. In that action he claims an injunction against *Ahrens & Co.*, and it may be that he claims an order from the Court to destroy those shells, because he says they are an infringement of his patent. In the course of that suit an injunction is obtained against *Ahrens & Co.* and against others, which injunction in terms forbids them from delivering these shells, which with other things are in their possession, to the ships of the Mikado, and in fact forbids them from sending the shells to *Japan.* To this action the Mikado was no party, but he or his agents here come forward and claim to have the delivery and the possession of these shells. The Defendants in the action are not unwilling to give the shells to the Mikado, but they say, "If we do so, it may be said that we have broken the injunction, and we may therefore be liable to certain penalties." It seems to me beyond dispute that this was the purpose for which the Mikado came in and desired to be made a party to the suit, and the Master of the Rolls thus describes the purpose. [His Lordship then read the judgment of the Master of the Rolls.] Now it is said that in the first place there is a dispute whether these shells are the property of the Mikado. It is argued that if he were a private individual, then, although he has purchased these shells and paid for them, yet, inasmuch as there has been an infringement of the patent, the property is not in him, because the Court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The

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patent law has nothing to do with the property. The facts here are undisputed, that *Krupp* made them with his own materials in *Germany*, where he had a right to make them, that he entered into a contract to sell specific shells to the Mikado, that that contract was performed, and that the shells were paid for, and that they were delivered in *Germany* to the Mikado's agent. Well, unless the patent law prevents the property from passing, nobody can doubt that the property passed to the Mikado. Therefore the dispute is not upon facts, but upon a false theory of law, that the patent law prevented the property from passing. I am clearly of opinion that the patent law did not prevent the property from passing. The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here.

Whether the fact of *Ahrens & Co.* bringing these goods into *England* under these circumstances, and with this intention, was an infringement of the patent, I decline to consider. I shall assume for this purpose that it was an infringement, and that we have in this country property of the Mikado which infringes the patent. If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue. The injunction is against the agents, the Mikado being then no party to the action, and not being forbidden to do anything. He then comes here as a sovereign, and requires the delivery of his own goods. His only difficulty is the injunction against the agents, and for the purpose of enabling the Court to make an order, he what is called "submits himself to the jurisdiction of the Court." I think the interpretation put by the Master of the Rolls upon the order then made is right, and that it was only an order that the Mikado might be made a Defendant for the purpose of enabling the Court to make the order which the Court has made. He now says, "I know not, and I care not, whether my agents have infringed your patent law. I have property in this country, which property is my own. I demand that it shall be delivered to me, and I make myself a Defendant in your Court merely for the purpose of your modifying

the order which you have made, so that my agents may not be injured in consequence of their delivering to me my own property." And the only order that the Master of the Rolls has made is that these goods may be delivered up to the Mikado; the meaning of which is that the mere fact of the Mikado taking these shells away shall not be considered as against *Ahrens & Co.* an infringement of the injunction. That is the whole effect of this order. The Mikado has a perfect right to have these goods; no Court in this country can properly prevent him from having goods which are the public property of his own country. Therefore it seems to me that this order, which is really made for the benefit of *Ahrens & Co.*, was an order rightly made, and that this appeal cannot be sustained.

Judgment, C. A. Brett, L.J.

COTTON, L.J.:—

Cottoon, L.J.

We have not got the order appealed from, because it has not been drawn up, but in substance it is either that the Mikado should be at liberty, notwithstanding the injunction, to take away the shells in question, or that some Defendants to the suit should, notwithstanding that injunction, be at liberty to deliver them to the Mikado, thus leaving the injunction against the Defendants to stand as it was, though doing away with the effect of the injunction, in so far that the particular goods in question are no longer stopped.

The point, therefore, which has been a great deal argued does not arise, whether the Defendants can justify an act which would otherwise be an infringement of the Plaintiff's patent rights, on the ground that they were acting as agents for a foreign sovereign. That question does not arise, but undoubtedly if parties in *England* are doing that which is an infringement of a patent, they cannot justify it by saying that some one who has no power to authorize them to use the patent has authorized them to do so. Certainly, my judgment in this case in no way depends upon any such proposition. After that injunction had been granted, and assuming that the injunction was properly granted against the Defendants in the suit, the Mikado came in and said, "These shells are public property of the country of which I am sovereign, and therefore I ought not to be prevented by that injunction from

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taking these shells. The injunction is not against me, but there may be a question whether the Defendants could allow me to take these goods away without committing a breach of the injunction; therefore I come in and state that the shells are public property of the country of which I am sovereign, and I ask the Court to give them over to me." In that proposition he is, I apprehend, clearly right. This Court has no jurisdiction, and, in my opinion, none of the Courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign.

Then, what besides was argued? I think one argument was very much this, that if the foreign sovereign had been a private individual he could have had no property in these goods, because they were violations of the Plaintiff's patent, or rather I should say more correctly, because they were to violate the Plaintiff's patent. Now there, I venture to say, is a fallacy. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the property in them. The Court in a suit to restrain the infringement of a patent does not proceed on the footing that the Defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the Plaintiff's rights, and does this as the most effectual mode of protecting the Plaintiff's rights—not on the footing that there is no property in the Defendant. The Court cannot proceed to give that relief and interfere with the articles unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used

in infringement of the Plaintiff's rights. As against a foreign sovereign, how could that be done? If these things, as on the evidence we must take them to be, are the property of the State of which the Mikado is sovereign, I can see no possible ground for interfering on any such principle as that on which the Court acts when a Defendant subject to its jurisdiction having been shewn to have infringed the Plaintiff's rights, the Plaintiff gets this relief, that either the articles are destroyed or the objectionable portion is removed.

The only other point which we really have to consider is this. It is said that although under ordinary circumstances there is no jurisdiction as against a foreign sovereign, yet that in this particular case there is jurisdiction in consequence of the Mikado having come in and obtained the order of the 11th of May. It is said that a sovereign suing submits himself to the Court as an ordinary Plaintiff, and that the Mikado, in consequence of having obtained this order and acted upon it, puts himself in the position of an ordinary Plaintiff. In the first place, there is this fallacy: the Mikado is not now in any way suing in the ordinary sense of the word, nor has he come to the Court to establish as against an adverse claim his title to the property, which is really what is meant by a foreign sovereign coming here to sue to establish his rights. He is simply coming and saying, "The order of the Court, possibly inadvertently, interferes with my sovereign rights. To prevent any question as to the Defendants' committing a breach of the injunction by allowing me to remove the property, make an order that they be at liberty, notwithstanding the injunction, to hand them over to me." So that, in my opinion, the very foundation for the suggestion fails. But again, even if the Mikado had brought himself into Court as an ordinary Defendant, that, in my opinion, would not give the Court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of *Japan*, which is represented here by the Mikado. But when one comes to look at the form of the order, the Mikado does not by it come in as an ordinary Defendant. By it he simply says, "I wish to bring before the Court the facts: that these are my property, that the Defendants were not constructing them under a contract for me, or using them under a contract with me. I wish

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to shew that they are my property. I wish to apply for liberty to remove them as the public property of the State of *Japan*, and for that purpose, if necessary, I ask to come in." In my opinion, the order taken fairly must be read with reference to the purpose for which the Mikado applied, and that being so, although possibly the form is not very happy, it is like a conditional appearance entered where a Defendant who considers himself improperly served with any proceeding has entered a conditional appearance, in order to contest the question, which he could not do without an appearance of some sort. It cannot, in my opinion, be said that the order puts the Mikado in the position of a Plaintiff or of a person who is made *simpliciter* a Defendant. He came in for the particular purpose of raising this question, and the form of the order, in my opinion, ought not in any way to prejudice the rights which he would have had independently of that order.

JAMES, L.J.:—

This appeal is dismissed with costs.

The costs of the short-hand writer's note of the proceedings before the Master of the Rolls were allowed.

Solicitors for Plaintiffs: *Harrison, Beal, & Harrison.*
Solicitors for the Mikado: *Wilson, Bristows, & Carpmael.*
Solicitors for Defendants: *Maples, Teesdale, & Co.*

Considered. Re GEORGE. [1949] 1 Ch. 154

In re TUSSAUD'S ESTATE.

TUSSAUD *v.* TUSSAUD.

[1877 K. 13.]

C. A.
1878
M. R.
March 20.
C. A.
June 1, 22, 24; *July* 23.

Double Portions—Satisfaction—Election—Covenant to settle—Subsequent Will—Parol Evidence.

20 CLD 881

T., on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his executors or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six calendar months after her death, transfer to the trustees £2000 consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees or trustee for the time being, should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, and after the decease of the survivor, for such children of the marriage as, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry, and if more than one in equal shares, and in default of children for the husband absolutely. In 1871 *T.* satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing £2800 to trustees in trust for the daughter for life for her separate use, without power of anticipation, and after her decease for such of her children as should attain twenty-one in equal shares:—

Held, by the Master of the Rolls, that the bequest of the £2800 was intended to be in satisfaction of the testator's liability under his covenant in the settlement, and that such of the parties interested under the settlement as were interested under the will were put to their election.

Held, on appeal, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.

Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, and there is no difference in this respect between the cases of a deed and a will.

Statement.

BY a settlement dated the 4th of February, 1867, made on the marriage of Mr. and Mrs. *White*, a sum of £500 was vested in trustees upon trust to invest and to hold the trust funds after the marriage upon trust to pay and transfer the same to such person or persons and for such estate or estates and in such manner as the wife, with the previous consent of the trustees or trustee for the time being, should by any writing or by will appoint, and in default of any such appointment, and so far as no such appointment should extend, in trust to pay the income to Mrs. *White*

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during her life for her sole and separate use, and after her decease in default of any such appointment as aforesaid, to pay such income to Mr. *White* during his life, and after his decease in trust for all the children of the marriage who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares, with a hotchpot clause: and on failure of the preceding trusts and in default of any appointment under the power the fund was to be held in trust for the husband absolutely. The wife's father, *Francis Tussaud*, covenanted with the trustees that if the marriage should take place he would, on or before the 31st of August, 1867, pay to the trustees the further sum of £500, and that his executors or administrators should within twelve calendar months after his death if he survived his wife, but if not, then within six calendar months after her death, transfer to the trustees the sum of £2000 consols. And it was declared that the trustees should stand possessed of such £500 and £2000 consols upon the trusts declared concerning the original settled sum of £500. The £500 was paid according to the above covenant.

In January, 1871, *Francis Tussaud* paid to the trustees £1000 cash, in part satisfaction of the covenant that his executors or administrators should transfer the £2000 consols. At that time £1000 consols were not worth so much as £1000, but it was arranged that the cash should be taken in satisfaction of £1000 consols, and the trustees released Mr. *Tussaud* from his covenant to that extent.

Francis Tussaud, by will dated the 30th of July, 1873, directed his trustees to stand possessed of a sum of £3000, upon trust to pay the income thereof to Mrs. *White* for life for her sole and separate use, without power of alienation or anticipation, and from and after her decease upon trust as to the capital of the last-mentioned trust fund for such of the children of Mrs. *White* as should attain the age of twenty-one years as tenants in common if more than one, and if but one such child, then the whole of the trust fund to that only child. The residuary estate was given to the testator's sons. The will did not contain any direction for payment of the testator's debts. By a codicil the testator reduced the legacy to £2800.

The testator died in September, 1873, and his wife in 1877.

A judgment having been given for administration of the testator's estate, the trustees of the settlement claimed to prove as creditors under the covenant for the value of the remaining £1000 consols, and the question arose whether the gift by the will was intended to be in satisfaction of the testator's liability under the covenant.

The case was heard before the Master of the Rolls on the 29th of March, 1878.

Argument.

Davey, Q.C., and *Northmore Lawrence*, for the trustees of the settlement:—

The covenant contained in the settlement by *F. Tussaud* to transfer to the trustees of Mrs. *White's* settlement the sum of £2000 consols has only been fulfilled to the extent of £1000 consols, and we contend that we are entitled to prove as against his estate for the remainder. It will be contended that the gift by the will of £3000, which by the codicil was reduced to £2800, for the benefit of Mrs. *White* and her children, was intended as a portion for her, and was a satisfaction of the covenant in the settlement. This, however, is not a case of double portions. Where, as in *Weall* v. *Rice* (1), there are only slight differences between the provisions in the two instruments, they will not repel the presumption as to double portions. Here, however, there is a substantial difference between the trusts of the settlement and the trusts of the will. Under the settlement Mrs. *White* had an absolute power of appointment over the trust funds overriding the other trusts. No such power is contained in the will. Under the settlement the husband had the second life interest, and in default of children was entitled absolutely. Under the will no interest is given to him at all. In *Lord Chichester* v. *Coventry* (2) it was held that great differences in the limitations of the trusts will be taken as indications that the gift in the will was not taken as meant to be in satisfaction of the covenant. Here the differences in the trusts are, we submit, quite as great as in *Lord Chichester* v. *Coventry*.

Owen, for *J. R. Tussaud*, one of the residuary legatees of the testator:—

The presumption in this case is that the legacy in the will must

(1) 2 Russ. & My. 251. (2) Law Rep. 2 H. L. 71.

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have been intended as a satisfaction of the covenant in the settlement. The case of *Lord Chichester* v. *Coventry* (1) is distinguishable, for there the first trust in the will was for the payment of the testator's debts. It is said that the fact of the husband taking an interest under the settlement, but being excluded under the will, favours the presumption that a double portion was intended; but that was the case in *Mayd* v. *Field* (2), and yet it did not prevent a case of satisfaction arising. The dispositions of the will shew that the testator did not intend the daughter to take the £2800 in addition to the amount remaining unsatisfied under the covenant in the settlement.

Ilbert, for another residuary legatee.

Solomon, for the executors.

Davey, in reply.

Judgment, M.R. JESSEL, M.R. :—

The law which I have to apply is by no means easy to apply, although I take it the long series of authorities have pretty well settled what the law is.

As I understand the law, the Court presumes that the parents, including in the term "parents" the person or persons standing in the place of the parents, do not intend to give double portions to their children. When the portion is given on the marriage of a daughter by the father, as it is in this case, of course it is a portion, however it may be settled. The gift of a sum for the advancement of the daughter in marriage makes it a dowry, or a portion, therefore there is never a contest whether it is a portion or not when it is a gift by the father on the occasion of the marriage of the daughter. He may give it to the daughter at once, in which case it at one time went to the husband. In that case it was a portion, and under the statute of 29 Car. 2, s. 25, it would have been taken into account in a distribution as a portion. There is no doubt it is a portion, and the mode in which it is settled is utterly immaterial. When, however, a benefit is given to the child by will, it is not every benefit that has been considered a portion, and the

(1) Law Rep. 2 H. L. 71. (2) 3 Ch. D. 587.

Court, therefore, has always to decide, in the first instance, what kind of provision made by a will is a portion, which very often is a difficult question.

Nobody would imagine, of course, that a father leaving a diamond necklace to a daughter would mean that to be a portion. In considering these cases you must take into account the nature of the benefit. Having got a sum of sufficient amount, as you have here, the next point to be decided is, how must the sum be limited to be a portion? There, again, there is room for a great variety of decisions. If the sum given to the daughter is of sufficient amount and given absolutely, then it is a portion, but supposing it is not given to her absolutely, what kind of limitations make it a portion for the daughter? You have to ascertain what it is that makes the sum given a portion to the daughter. Upon that subject there have been decisions.

In the first place, it has been held that a gift to the daughter for life, with a superadded power of appointment to dispose of it as she will, is in substance a provision for the daughter. That is pretty plain. She takes the real interest, and it is probably better secured for her than if it had been given to her separately for her absolute use.

It was held in the case of *Lord Chichester* v. *Coventry* (1), that such provision by will was a portion. Then the question arose, supposing the testator gives it to his daughter for life as a married woman, with remainder to her children, is that a portion to the daughter? Of course the benefit to the daughter is a portion, but is the provision for the children, with a superadded power of appointment to dispose of it, a portion? The Court decided, and, I think, in a rational and sensible way, that that is equivalent to the testator saying, "I give the sum as a portion to my daughter, and I settle it in the way I think a married daughter's portion should be settled;" and therefore it was held that a gift by will to a daughter for life with a remainder to her children was a portion to the daughter. That was held in the case of *Lady Thynne* v. *Earl of Glengall* (2).

Then there is another case. Supposing, besides a limitation to the daughter's children, you settle it on the daughter for life, and

(1) Law Rep. 2 H. L. 71. (2) 2 H. L. C. 131.

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the husband for life, and then the children, is that a portion? That is, is the whole sum a portion, or must you deduct from it the interest of the husband? There, again, the Courts of Equity, with their usual common sense, said, "No, that is also a settlement to the daughter; it is the way in which a prudent father would settle it." He gives it to the daughter's husband before the children, and the whole thing is a provision for the daughter settled by the father for the benefit of the daughter and her husband and children. That was settled in the well-known case of *Weall* v. *Rice* (1), where the provision was in that shape.

It therefore comes to this, that wherever there is a sufficient sum which can reasonably be presumed to be a provision, and wherever it is so settled by the will in the ordinary way, the Courts of Equity have said, that is a daughter's portion within the rule to the extent of the whole fund. Having found out what is a portion within the rule, there arose this question, Does the rule as to double portions apply where the settlement is made by way of absolute gift before will? The case of absolute gift on marriage, or settlement on the marriage, or absolute gift without settlement on the marriage, was decided according to the rule of Roman law.

Then there came another case. Supposing a father had only bound himself to pay before will, but had not paid, did the rule apply then? It was held it did apply. If it was actually paid before, you could not take it away; but where it was not paid before, and the will also gave a portion, there the rule did apply, and the will provision was held to be a satisfaction, either in whole or in part, of the obligation to pay the portion which had been incurred by the father before the date of the will.

That matter being decided, there came another point, which was this, that the old rule, being a presumption of law, like all presumptions of law, could be rebutted. Of course it could be rebutted, and got rid of by extrinsic evidence, but it could also be rebutted and got rid of by intrinsic evidence—that is, where the two provisions were so inconsistent in their nature as to lead the Court to the conclusion that the gifts were intended to be cumulative.

(1) 2 Russ. & My. 251.

Now, one can easily see cases in which that presumption would be rebutted by such considerations as these. Suppose the father, on the marriage of his daughter, gave £5000 to the husband, of which the husband did not make a settlement—when I say "gave" I mean made a covenant or gave a bond to pay that sum to him—of course that would be equally a portion to the daughter whether the covenant to pay it was to the daughter and the daughter handed it to the husband, or the covenant was to pay it to the husband. If the father afterwards made his will, giving a sum to the daughter for life, with remainder to the husband for life, and with remainder to the children of the marriage, it would be difficult to say that that was not a provision, because, in the first place, there was no provision for the daughter at all. The second provision is a provision for the daughter. In that case, I think, the reasonable presumption would be that the father did intend his second provision to be an independent provision for his daughter. That is the point which the law regards. The subsequent limitation would be looked upon as a mere limitation of her portion in a sense for her benefit, being the best mode, as the father thinks, of disposing of her property. I can imagine a case of that kind to be clear; but when you come to intermediate cases, it is rather the impression produced on the mind of the Judge than any rule of law which governs the case.

I think the rule has been correctly stated in the case of *Weall* v. *Rice* (1), which on this point appears to me to be approved of by the House of Lords, in the more recent case of *Lord Chichester* v. *Coventry* (2), "that where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature, and every Judge must decide that question for himself."

There is only one observation I have to make on the general

(1) 2 Russ. & My. 251, 263. (2) Law Rep. 2 H. L. 71.

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law. It has been held several times, and notably in the last case of *Lord Chichester* v. *Coventry* (1), that a presumption against double portions is more easily displaced where the obligation, or covenant, or settlement precedes the will, than where it follows. That being so, I have to consider what I believe is a new case as regards the limitations. The limitations by the present settlement are very remarkable. There is a power given to the wife, with the consent of the trustees, to revoke the settlement altogether, and then, subject to that power, which may or may not be exercised, there are the usual trusts for the wife for her life, for her sole and separate use, and after her death the property is to be in trust for the husband for life, and then for such of the children of the marriage as shall attain twenty-one, or being daughters shall attain that age or marry; then, in default of children of the marriage, it is to be in trust for the husband.

Then we come to the will. The will gives, not the same sum, but a different sum, £3000, out of the residuary estate, upon trust to stand possessed thereof, "and to pay the yearly income to my daughter," that is, the lady in question, *Rebecca Marie White*, "*to* her sole and separate use, without power of alienation, and after her death, to such children as shall attain twenty-one, and if but one, then such only child." There is a little difference in the trust. If there are no children, it falls into the residuary estate, and goes to his own sons. It is obvious that there are important distinctions as regards the two forms of settlement, and the question I have to consider is whether they are of sufficient importance to rebut the presumption that the testator did not intend the daughter to take both.

A further argument is that it is very difficult to settle the rights of the parties if you hold to the presumption. That is giving the go-bye to the question, but the moment you find by law or by the circumstances of the case that it is intended that it shall be taken in satisfaction, the doctrine of election comes and solves all difficulties. Therefore, if there had been unrestricted power to the married woman, if she had elected to take under the will, she could not have exercised the power. The real question is, does

(1) Law Rep. 2 H. L. 71.

the rule apply when you have these two settlements together; is there any reason for applying it, or is there not a reason for not applying the rule?

We have the case of *Mayd* v. *Field* (1), in which these questions were considered. In the case of *Lord Chichester* v. *Coventry* (2) it was held that where there was no provision for the children by the will, where the provision was for the lady for life with remainder as she should appoint, whilst by the marriage settlement there was a provision for the husband and children, there was such a material difference that the Court would not hold that the one was intended to be the same as the other.

Now, although I strongly suspect that what I am about to say will not carry out the intention of the testator, I feel myself bound by the law to say that the substance of the provisions is not to be set aside for slight differences in the nature of the provisions, and I also feel bound to say that when I look at these two settlements I cannot see that substantial difference which is necessary in my opinion. In the first place, the provision for the wife and children, or for the husband and children, will not stand in the way. In that form of settlement, the mere fact that the husband is left out in the second settlement raises no difference in my mind, because the settlement on the children is more beneficial as far as they are concerned.

But then it is said there is power to the wife, with the consent of the trustees, to dispose of the property absolutely. I am not impressed with that, because if it was a power to the wife alone, it is only for life. He has given her a larger provision in what he thinks a more beneficial way, by settling that with a restraint on anticipation, and by giving it afterwards to her children. I cannot see the inconsistency. He may have thought, and reasonably thought, that the larger sum of £3000 was a larger provision with the remainder to her children, that is, a larger provision for her; for that is what the law says; he may have thought that the £3000 provided for the daughter and settled upon her children was a better and more satisfactory provision than the power of disposing of £1000 and remainder to her children. They appear to me to be provisions substantially of the same nature, and I

(1) 3 Ch. D. 587. (2) Law Rep. 2 H. L. 71.

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cannot bring my mind to see that there is that important and substantial difference which should make the two provisions, so to say, of a different nature. They are different forms of settlement for the benefit of the daughter. But they are, in my opinion, similar and not dissimilar forms of settlement, because the whole of the law assumes that you are beginning with the proposition that they are not identical before you can consider their similarity. I am of opinion, looking at the authorities, that there is no sufficient distinction between the nature of the two settlements, and that the rule applies.

Now, what is the effect of that? You cannot deprive the husband of his right and you cannot deprive the children of their right to get paid. What is the rule of election? Inasmuch as the persons who are to elect cannot compel third persons to come in, and therefore cannot make complete election by giving full effect to the will, they can only satisfy it so far as their interest extends. If, therefore, the wife comes in under the will, she can neither exercise her power nor take a life interest in the £1000, but if she will come in under the will and codicil she can only take the £2800. It is obvious, as far as the children are concerned, that their interest in the £1000, which is postponed to two life interests, is less than their interests in the £3000, which is only postponed to one, and as regards the £1000 as the interest is so much greater under the will than under the settlement, they will elect to come in under the will.

The order will be that, the Court being of opinion that the legacy given by the testator is in satisfaction of the covenant in the settlement, the parties must elect under which instrument they will take.

C. A.

The trustees of the settlement appealed. The appeal came on to be heard on the 1st of June.

Argument.

Davey, Q.C., for the Appellant, after opening the case, tendered in evidence an affidavit by Mr. *White* of declarations made by the testator rebutting the presumption that he intended to satisfy the covenant in the settlement. He referred to *Trimmer* v. *Bayne* (1); *Kirk* v. *Eddowes* (2); *Taylor* on Evidence (3).

(1) 7 Ves. 508. (2) 3 Hare, 509. (3) 7th Ed. p. 1023.

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Bagshawe, Q.C.:—I object to the admission of this evidence. The question before the Court is the construction of a will. Where the question is as to the construction of a deed *inter vivos* you can admit evidence of the intention of the parties, but where the construction of a will is in issue you cannot admit evidence of the testator's intention, although it is admissible as to the state of circumstances in which the will was executed: *Charter* v. *Charter* (1); *Hall* v. *Hill* (2).

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that this evidence is clearly admissible. Upon the authority of decided cases, and according to the opinion expressed in all the books, as well as the uniform course of practice, parol evidence is admissible to rebut a presumption, although not to raise a presumption. Mr. *Bagshawe* was driven to admit that if this instrument had been a deed, and a question had arisen whether the provisions of the deed were to operate as an ademption of a previous gift in a will, the evidence would have been admissible. But it is not reasonable to admit evidence as to the effect of a deed and to refuse to admit it as to the effect of a will. When we have to consider the effect of a will and a deed, the rules as to the admission of evidence must be the same whether the deed or the will was executed first. The authorities are uniform in favour of the admission of evidence in such a case as the present.

Brett, L.J.

BRETT, L.J.:—

I am of the same opinion. The question is whether certain declarations of the testator ought to be admitted as evidence. There are two instruments, one a deed, the other a will, and it is said by one side that it is consistent with the terms of these two instruments that the trustee should receive the benefit both of the will and the deed, but that the Courts of Equity raise a presumption that the gift in the will was intended to be in satisfaction of the covenant in the deed, and that where that is the case the Courts of Equity have always allowed evidence of declarations by the testator to shew that this was not his intention, and to rebut the presumption. On the other side it is said that the object of

(1) Law Rep. 7 H. L. 364. (2) 1 D. & War. 94.

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Judgment, C. A. Brett, L.J.

such evidence is to construe the will, and that, although extrinsic evidence is admissible in such a case to construe a deed, it is not admissible to construe a will. I know of no such distinction. As a general rule, no evidence is admissible as to the intention of a deed; you may admit evidence as to the surrounding circumstances to shew the meaning of the instrument, but not to shew what the parties intended to say. Nor can evidence be admitted to assist the Court in construing a will. But it does seem to me clear that the Courts of Equity, when they hold that a presumption has arisen, have allowed evidence to rebut that presumption; and looking at the cases cited, they are consistent with what is laid down in *Taylor* on Evidence, that where there are two instruments, and where the circumstances are such that the Court of Equity raises a presumption that one is in satisfaction of the other, there the Court will receive evidence of declaration of the parties to rebut such presumption; but where there is *primâ facie* no presumption in equity, there the Court will not allow evidence to be given to raise a presumption and to shew the intention of the parties. The case of *Hall* v. *Hill* (1) appears to me consistent with what is laid down in *Taylor* on Evidence on this point. In the present case I think the evidence is admissible.

Cotton, L.J.

COTTON, L.J.:—

I am of the same opinion. I will add nothing, except to say that it is important not to relax the rule against admitting parol evidence to construe wills—that is, evidence to shew what the will means. That you cannot do, unless there is a latent ambiguity—for instance, as to two legatees of the same name—or as to the meaning of terms of art. But here there is no such case. Here there is a daughter and her family entitled to a portion under a settlement, and then a will, in which you find a provision in favour of the same daughter and some of her family. You do not want to construe that; but the question arises, whether both portions are to be paid. You look at the will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention to give a

(1) 1 D. & War. 94.

double portion. That is entirely independent of the construction of the will. When you come to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence to rebut such presumption. I know no distinction in this respect between a deed and a will. The whole fallacy lies in supposing that it is for the purpose of determining the construction of the instrument. You first construe the will, and if in any way a presumption arises, you admit evidence to rebut that presumption. This is quite consistent with the judgment of Lord *St. Leonards* in *Hall* v. *Hill* (1). This evidence must therefore be admitted.

Judgment, C. A. Cotton, L.J.

June 24. *Davey*, Q.C., and *Northmore Lawrence*, for the Appellants :—

Argument.

We contend that there is such a dissimilarity between the trusts as to rebut the presumption of satisfaction. Under the settlement the wife has a power of appointment, by virtue of which she might, with the consent of the trustees, dispose of the fund in any way, and the husband has a life interest. Under the will there is no power of appointment, and the husband takes nothing. The cases were fully discussed in *Lord Chichester* v. *Coventry* (2), and the result is that slight differences will not rebut satisfaction, and that it rests with the Court to say whether the differences are slight. All the Lords agreed in this, that the presumption against double portions is rebutted much more easily where the settlement precedes the will than where the will precedes the settlement.

[JAMES, L.J :—Can a married woman who is restrained from anticipation be put to her election ?]

It is submitted not: *Robinson* v. *Wheelwright* (3); but the Master of the Rolls held that the Court had power to lay hold of her interest before it came to her, and he directed an election on the same scheme as in *Mayd* v. *Field* (4). With the exception of that case there is hardly an authority to be found in favour of satisfaction, unless every person entitled under the prior settlement took something under the will. In *Weall* v. *Rice* (5) the

(1) 1 D. & War. 94.
(2) Law Rep. 2 H. L. 71.
(3) 6 D. M. & G. 535.
(4) 3 Ch. D. 587.
(5) 2 Russ. & My. 251.

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same parties took, and, as the Court considered, substantially, the same interests. In *Lady Thynne* v. *Earl of Glengall* (1) all persons who took under the settlement took under the will, though a further class of children was let in. *Bethell* v. *Abraham* (2) and *Mayd* v. *Field* (3) depart from this, but we submit that the departure is against principle. The Master of the Rolls relied on *M'Carogher* v. *Whieldon* (4), where, however, a very whimsical result was produced by the election. There cannot be an intention to put the parties to election in this partial way.

Bagshawe, Q.C., and *Owen*, for a residuary legatee:—

It is for the Court to say whether the differences are slight or not. The question is discussed in *Dawson* v. *Dawson* (5); and the question whether there is a direction in the will to pay debts is material: *Paget* v. *Grenfell* (6).

[JAMES, L.J.:—I do not see how that can be material. The executors must pay the debts just the same whether there is a direction or not.]

It was treated as material in *Coventry* v. *Lord Chichester* (7). *Bethell* v. *Abraham*, as far as it goes, is in our favour.

[JAMES, L.J.:—We there came to the conclusion that the testator had in fact said that he intended satisfaction.]

The general rule is not to be departed from upon considerations which merely lead up to this, that the second provision is not in all points a perfect substitution for the first.

Solomon, and *Ilbert*, for other parties.

Northmore Lawrence, in reply.

Judgment, C. A.

July 23. COTTON, L.J., now delivered the judgment of the Court (*James*, *Brett*, and *Cotton*, L.JJ.):—

This is an appeal from a judgment of the Master of the Rolls,

(1) 2 H. L. C. 131.
(2) 3 Ch. D. 590, n.
(3) Ibid. 587.
(4) Law Rep. 3 Eq. 236.
(5) Ibid. 4 Eq. 504.
(6) Ibid. 6 Eq. 7.
(7) 2 D. J. & S. 343.

whereby he in effect decided that a sum of £2800 which Mr. *Tussaud*, the testator in the cause, settled by his will for the benefit of Mrs. *White* and her children, was intended to be in satisfaction of his liability under a covenant contained in a settlement made previously to the marriage of Mrs. *White*, and that such of the persons interested under the settlement as were also interested under the will must elect under which instrument they would take.

The facts are these: Mrs. *White* was a daughter of the testator. In February, 1867, a settlement was executed previously to and in contemplation of her marriage. By that settlement Mr. *Tussaud*, the testator, covenanted with the trustees that his executors should, within six months from his death if he should survive his wife, or, if he should predecease her, then within six months from the death of his wife, transfer to the trustees £2000 consols. It was declared that these consols, when transferred, should be held upon trust for such persons as Mrs. *White*, with the previous consent of the trustees, should from time to time, notwithstanding coverture, by any writing or by her last will, direct and appoint, and in default of such appointment upon trust for Mrs. *White* for her life for her separate use, after her death for her husband for his life, and after the death of the survivor for the children of the then intended marriage who should attain twenty-one, or in the case of daughters marry under that age; and in default of children, in trust for Mr. *White*, his executors, administrators, and assigns. In the year 1871 the testator paid £1000 to the trustees of the settlement in part performance of his covenant to the extent of £1000 consols. In 1873 the testator in the cause died, having made his will, which was dated on the 30th of July in that year, and by his will and a codicil thereto he directed that £2800, part of his estate, should be held by trustees upon trust for Mrs. *White* for life for her separate use without power of anticipation, and after her death for her children by any marriage who should attain twenty-one. If there were no children who attained a vested interest, the fund fell into the residue and went to the testator's own sons. At the time of the testator's death his liability under the covenant was reduced to £1000 consols.

C. A. 1878 — *In re* TUSSAUD'S ESTATE. TUSSAUD v. TUSSAUD. — Judgment, C. A.

The Master of the Rolls decided that the legatees claiming under the will were bound to elect between the provision made for them by the will and that made by the settlement, on the ground that there was not sufficient to prevent the presumption that a father does not intend to make a double provision for a child from applying to the case. It is well established that there is such a presumption which, as stated by Lord *Cranworth* in *Lord Chichester* v. *Coventry* (1), "is in these cases founded on the assumption that in making the second instrument the maker of it supposes himself to be substantially satisfying the obligations of the first." But this presumption must yield to any sufficient indication of intention on the part of the maker of the instrument, if expressed on the face of that document, or if there is no expression of intention on the face of the instrument, it may, like any other presumption of law, be rebutted by extrinsic or parol evidence to shew what was the intention of the testator when he made his will. In the present case, Mr. *Davey* tendered parol evidence to rebut the presumption, and this, after argument, we held to be admissible. But after having heard the evidence, we are of opinion that it does not aid the case of the testator's daughter, Mrs. *White*, and her children.

The question therefore must be, is there sufficient on the face of the will to shew that the testator did not intend the provision thereby made to be in lieu of that made by the settlement, or, in other words, to satisfy his obligation under that instrument? In arriving at a conclusion on this question, we must, of course, look at the settlement, for the purpose of seeing what the obligations of the testator under that instrument and the provision thereby made for his daughter's family were. What we have to consider is well expressed by Lord *Colonsay* in the case of *Lord Chichester* v. *Coventry* (2), in these words: "But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other." It must be remembered that slight differences between the two provisions

(1) Law Rep. 2 H. L. 89. (2) Law Rep. 2 H. L. 98.

will not be sufficient to prevent the presumption from arising. Slight differences, however, in the words of Sir *John Leach*, in *Weall* v. *Rice* (1), are such "as, in the opinion of the Judge, leave the two provisions substantially of the same nature;" and he adds, "every Judge must decide that question for himself." What, then, are the differences in the present case between the two provisions? In the first place, under the settlement Mrs. *White*, with the consent of the trustees, had an absolute power to deal in any way she thought fit with the fund which the testator had thereby convenanted to settle. The will did not give Mrs. *White* any such power. Under the settlement Mr. *White* took, subject to the life estate of his wife, a life interest in the fund; and if no children attained a vested interest, he, unless his wife dealt with the fund under the power, became absolutely entitled thereto, while under the will no interest was given to him in the legacy thereby settled; and if there was no child of Mrs. *White* who attained a vested interest, the settled fund went to the testator's sons. These differences, in our opinion, cannot be considered as slight. They are substantial differences between the two provisions. However, if the legacy given by the will was intended to be a satisfaction of the testator's obligation under the settlement, it could only be so by putting the parties claiming under the will to their election; and the fact that one of the persons who took a substantial interest under the settlement takes no interest under the will is a strong reason for coming to the conclusion that the testator did not intend the gift by will to be in lieu of, or in satisfaction of, his liability under the former instrument. In our opinion it is erroneous to treat the difference between the persons interested under the two interests merely as creating a difficulty in carrying into effect the testator's intention. If the intention is expressed, it must be carried into effect so far as practicable, and difficulties in completely effecting the intention cannot alter the construction. But where the Court has to determine whether a presumption arises—that is, whether a particular intention ought to be assumed—the circumstance that the limitations of the will, as to which there is no doubt, are not consistent with effect being given to that intention which the Court is asked to presume, is a strong argument

(1) 2 Russ. & My. 268.

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against assuming that the testator had any such intention. We are of opinion that there are such substantial differences between the provision made by the will and that made by the settlement, both of which we consider as portions provided for the testator's daughter, Mrs. *White*, as prevent the presumption against double portions applying to the present case—that is, as satisfy us judicially that the testator did not, in making his will, suppose himself to be substantially satisfying the obligations of the settlement.

It is unnecessary for us to go through the numerous cases which were referred to in argument. But it must be remembered that the case is one, not of ademption, but of satisfaction, and the two classes of cases are pointedly distinguished in the case of *Lord Chichester* v. *Coventry* (1). In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation. We mention this to shew that many decisions where, in cases of ademption, differences between the two provisions have been held insufficient to prevent the presumption against double portions from applying, cannot be considered as authorities in the present case. There are very few cases in which a gift by will has been held a satisfaction of a previous liability, in which the persons interested under the will have not included all interested under the previous settlement. *M'Carogher* v. *Whieldon* (2) was, however, such a case. But the decision in that case cannot be considered as proceeding on any principle inconsistent with our present decision. There, by the settlement, the testator had covenanted to leave one-fifth of his residuary estate to trustees for his son for life, then for his intended wife for life, and afterwards for their children; and all that the Master of the Rolls in that case decided was that an absolute

(1) Law Rep. 2 H. L. 71. (2) Law Rep. 3 Eq. 236.

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bequest to the son of one-fifth of the testator's estate was a satisfaction of the life interest which the son took under the father's covenant in one-fifth of his estate.

In our opinion the decision of the Master of the Rolls must be reversed, and a declaration made that the provision made by the will and codicil for Mrs. *White* and her children is not to be considered as a satisfaction of the testator's liability under the covenant in the settlement.

Solicitors: *H. S. Smith; J. E. Turner; J. G. Joyce; W. A. Crump & Son.*

Ex parte FLETCHER. *In re* HART.

C. A.
1878
July 25.

Court of Bankruptcy—Jurisdiction—Duty of Trustee—Order for Delivery of Possession of Land—Foreclosure—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *ss.* 20, 65, 72.

When a stranger to a bankruptcy is willing to submit to the Court of Bankruptcy the determination of his rights in relation to property of the bankrupt, it is improper for the trustee in the bankruptcy to raise objections to the exercise of jurisdiction by that Court. Such a person ought to be encouraged to submit to the jurisdiction.

Quære, whether the Court of Bankruptcy has jurisdiction to make an order for foreclosure.

Order made that the trustee in a bankruptcy should deliver possession of a house, of which the bankrupt had been weekly tenant, to the lessee of the house, who, as between himself and the bankrupt, was mortgagee of the lease from the bankrupt.

Ex parte Dickin (1) distinguished.

Observations on *White* v. *Simmons* (2).

10 Ch. D. 410
11 Ch. D. 282.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

By a deed dated the 25th of March, 1876, the *Aerated Bread Company* demised to *William Niel* a house and premises known as No. 56, *Blackman Street, Borough*, for a term of 24¾ years. The lease contained a covenant by the lessee not to assign or dispose of the lease or the demised premises without the license of the company and their superior landlords. By a deed dated

(1) 8 Ch. D. 377. (2) Law Rep. 6 Ch. 555.

C. A. 1878 *Ex parte* FLETCHER. *In re* HART.

Statement.

the 5th of May, 1877, *Niel* (with license) assigned the lease of the 25th of March, 1876, to *Thomas Wilkinson*. *Wilkinson* took the assignment at the request of and as a trustee for *H. W. Hart* (the then occupier of the premises as weekly tenant), to whom he had advanced money, and it was agreed that he should hold the lease as a security for his advances. *Hart* was to continue in occupation of the premises as weekly tenant, at a rent of £4 a week. The agreement between *Wilkinson* and *Hart* was evidenced by a letter written by *Wilkinson's* solicitor to *Hart*, in which he said, "Although the lease was by consent absolutely transferred to my client he is only your mortgagee, and you are in possession with his sanction." On the 24th of May, 1877, *Hart*, by a memorandum in writing, charged his interest in the lease in favour of *F. A. Rowland*, to secure the repayment of £20 advanced by him, and agreed to execute a legal mortgage when called upon to do so. By a deed dated the 29th of May, 1878, *Wilkinson*, in consideration of £650, the amount then due from *Hart* to *Wilkinson* on the security of the lease, assigned his interest in the lease to *J. F. Fletcher*. In June, 1878, *Hart* was adjudicated a bankrupt. On the 4th of July, 1878, the weekly rent being in arrear, *Fletcher* applied to the Registrar for a direction that the trustee in the bankruptcy should forthwith deliver up to *Fletcher* possession of the demised premises, and that an account might be taken of what was due from the bankrupt to *Fletcher* for principal, interest, and costs on the security of the demised premises, and that, in default of payment of the sum found due, the trustee might stand foreclosed of his equity of redemption in the premises. No notice had been given to determine the weekly tenancy. The Registrar held that he had no jurisdiction to make the order, and he dismissed the application with costs, but with liberty to *Fletcher* to apply to the Court with respect to the subject-matter of the application on any such further and amended notice of motion as he might be advised. *Fletcher* appealed.

Argument.

W. Latham, for the Appellant:—

The Appellant, as legal owner of the lease, is entitled to possession, and the Court of Bankruptcy has ample jurisdiction to order possession to be given to him: *Bankruptcy Act*, 1869, ss. 65, 72.

This will save expense and will prevent the necessity of taking proceedings in the High Court. I admit that it is not usual for the Court of Bankruptcy to make a foreclosure decree, but the words of sects. 65 and 72 are wide enough to give it jurisdiction to do so, and there is no decision that it cannot. There is, however, a *dictum* of Lord *Hatherley* to that effect in *White* v. *Simmons* (1), but it is only a *dictum*. Owing to the stringent nature of the covenant against assignment, the Appellant cannot avail himself of the provisions of rule 78 to obtain a sale of the property by the Court. Inasmuch as, by virtue of sect. 20, the trustee stands in the same position as a receiver appointed by the Court of Chancery, an application must be made to the Court of Bankruptcy.

Winslow, Q.C., and *D. L. Alexander*, for the trustee:—

If the Court of Bankruptcy has jurisdiction, the exercise of it is discretionary, and it ought not to be exercised for the purpose of trying a mere ejectment action: *Ex parte Dickin* (2). There is no reason why the Appellant should not avail himself of his ordinary legal remedy. An action of ejectment could not be maintained until the tenancy had been determined by notice. The trustee is in possession, not as receiver, but as tenant to the mortgagee. He ought to be required to disclaim. He is carrying on the bankrupt's business with a view to preserve it for the benefit of the creditors; if he is turned out of possession the business will be destroyed.

As to foreclosure, Lord *Hatherley*, in *White* v. *Simmons* (3), distinctly says that it cannot be obtained in bankruptcy, and in the present case such an order cannot be made, because the second mortgagee is not before the Court.

W. Latham, in reply.

JAMES, L.J.:—

I am of opinion that the application was right in substance. The cases in which the Court of Bankruptcy has decided that it

(1) Law Rep. 6 Ch. 555, 558. (2) 8 Ch. D. 377.
(3) Law Rep. 6 Ch. 558.

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ought not to assume jurisdiction are cases where it was asked to draw within its jurisdiction a person outside the bankruptcy, merely because his opponent had become a bankrupt. Where, however, the proceeding is not *in invitum*, but a person who has a claim against property of the bankrupt, real or personal, is willing to submit the determination of his rights to the Court of Bankruptcy, it is very wrong, very reprehensible for the trustee to raise objections to the exercise of jurisdiction by that Court under whose care the property of the bankrupt is placed, and by which it is being administered. It is right that a stranger to the bankruptcy should be encouraged to come in and submit to the jurisdiction of the Court of Bankruptcy, and thus prevent the necessity and the expense of proceedings in another Court. And when such a person does come in and submit himself to the jurisdiction, the Court ought to decide the case according to the truth and justice of it, and not to allow merely technical objections to be interposed for the purpose of delay. The Appellant's case is, that, though he is in form the absolute legal owner of a lease, the real nature of the transaction was that he was to take it only as a security, that the relation between the bankrupt and him is that of mortgagor and mortgagee, and that the bankrupt became his tenant at a weekly rent. It is said that no notice has been given to determine the tenancy, and that the Appellant ought to give that notice and then bring an action of ejectment. There is no real answer to the Appellant's case. If I had been in the Registrar's place I should have said, I will order possession to be given to you at the end of a week, and, in order to avoid any difficulty as to the time when the week's notice ought to terminate, he might properly have ordered possession to be given at the end of fourteen days. I think that is the order which we ought now to make, unless the trustee is willing to pay into Court within fourteen days the amount claimed by the Appellant as due to him on his security. The Appellant must within seven days make an affidavit of what he claims, and within seven days after that the trustee must pay the amount claimed into Court. Then an account will be taken of what is due (including the overdue rent), and, upon payment of what shall be found due, the Appellant must assign the lease to the trustee. The trustee must

undertake to pay the weekly rent while the account is being taken. With regard to foreclosure, I do not like to say now that the Court of Bankruptcy has no jurisdiction to order it, for it is very desirable that every question relating to the property of a bankrupt should, if possible, be determined by one Court, but such an order has never, I believe, yet been made by the Court of Bankruptcy. In the present case this difficulty is suggested, that there is a second mortgagee, who is not before the Court, and therefore we do not think it desirable to go further than the order I have already mentioned. But I wish to leave the question open, and not absolutely to abjure the jurisdiction. What Lord *Hatherley* said in *White* v. *Simmons* (1) was only one of the reasons which he gave for his decision, the decision being that the Court of Chancery had concurrent jurisdiction with the Court of Bankruptcy to realize the security of an equitable mortgagee of a bankrupt, a matter about which there could be no doubt. The Appellant will add his costs both here and in the Court below to his security.

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10 Ch D 611

BRETT and COTTON, L.JJ., concurred.

Brett and Cotton, L.JJ.

Solicitor for Appellant: *J. Wilson Heritage.*
Solicitor for Trustee: *H. Montagu.*

LATIMER *v.* AYLESBURY AND BUCKINGHAM RAILWAY COMPANY.

C. A. 1878 *Aug.* 6.

[1878 L. 157.]

Vendor's Lien against Railway Company—Motion for Injunction and Receiver before Judgment.

Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the Court will not grant an injunction or a receiver against the company before judgment has been obtained in the action, even though the company admit their liability.

Statement.

THIS was an action by the Rev. *E. W. F. Latimer* against the *Aylesbury and Buckingham Railway Company* for specific perform-

(1) Law Rep. 6 Ch. 558.

C. A. 1878

LATIMER v. AYLESBURY AND BUCKINGHAM RAILWAY CO.

ance of an agreement for the purchase by the Defendants of a piece of land, part of the glebe of the parish, for the purposes of their railway for £221. The Defendants entered on the land and constructed and opened their railway, but did not pay the principal or interest on the purchase-money. The Plaintiff prayed for specific performance and for an injunction and receiver.

Statement.

The writ was issued on the 15th of June, 1878, and on the 17th of July, before the Defendants had put in their defence, the Plaintiff moved, before Vice-Chancellor *Malins*, for a receiver of the rents and profits of the piece of land, and for an injunction to restrain the Defendants from running trains over it. In an affidavit filed in opposition to the motion, the secretary of the company did not deny their liability, but stated that he had been already appointed by the Master of the Rolls receiver in three other suits against the same company; and that he was bound to pay into Court in those suits all the surplus of the receipts of the company over their necessary expenditure.

Vice-Chancellor *Malins* refused to make any order on the motion, except that the costs should be costs in the cause, and that the action should be transferred to the Court of the Master of the Rolls.

From this order the Plaintiff appealed.

Argument.

Townsend, for the Appellant:—

The Court has on several occasions granted an injunction and receiver to an unpaid vendor against a railway company after a decree establishing his lien. There is no distinction in this respect between a railway company and an ordinary purchaser. It is true that in some cases the Court has refused an injunction on interlocutory motion before decree; but there is no reason or principle for this distinction when the company, as in the present case, do not dispute their liability, and the refusal of the motion would only increase the expense of both parties: *Pell* v. *Northampton and Banbury Junction Railway Company* (1); *Wing* v. *Tottenham and Hampstead Junction Railway Company* (2); *Cosens* v. *Bognor Railway Company* (3). At all events, the Plaintiff is

(1) Law Rep. 2 Ch. 100. (2) Law Rep. 3 Ch. 740.
(3) Law Rep. 1 Ch. 594.

entitled to a receiver: *Williams* v. *Aylesbury and Buckingham Railway Company* (1).

Farwell, for the Defendant company, was not called on.

JAMES, L.J.:—

Judgment, James, L.J.

The decision in *Pell* v. *Northampton and Banbury Railway Company* (2), where an injunction before decree was refused, is binding upon us, and it appears to me to be a correct decision. No doubt the company has taken the Plaintiff's land and has not paid for it, but that does not enable us to make this order. If the Plaintiff is entitled to judgment in the action he will get judgment at the hearing; but this application for an injunction and receiver is wrong. An interlocutory application to restrain a railway company from running their trains is monstrous.

Then, as to the appointment of a receiver, a receiver could only be for the particular portion of the line purchased from the Plaintiff. What could the receiver do with that? He could not manage the line, he could not receive the tolls. All that he could receive would be the proportion of the net profits of that small portion of the line after paying all the working expenses and other outgoings. Such an order cannot be made before judgment.

BRETT and COTTON, L.JJ., concurred.

Brett and Cotton, L.JJ.

Solicitors: *Evans, Foster, & Rutter; Burchells.*

(1) 28 L. T. (N.S.) 574. (2) Law Rep. 2 Ch. 100.

C. A.
1878
Aug. 18.

CROXTON *v.* MAY.

[1868 C. 43.]

Woman past Child-bearing—Payment out of Court—Married Woman aged Fifty-four and Six Months.

The Court refused to treat a woman as past child-bearing whose age was fifty-four and six months and had never had any children, but had only been married three years.

Statement.

BY a decree made on the hearing of this cause on the 30th of May, 1870 (1), it was declared that a certain legacy of £1000 bequeathed to *Mary Susanna Croxton*, the wife of *George Croxton*, should be held, subject to certain payments, in trust for *Mary Susanna Croxton* during her life for her separate use, and after her death in trust for all her children by her present or any future husband, and in default of children in trust for *George Croxton* absolutely.

Mrs. *Croxton* was married in 1861. A few months after their marriage she separated from her husband, but about three years before the filing of the petition they came together again, and had since been living together as man and wife.

Mrs. *Croxton* was now of the age of fifty-four years and six months, and had never had any children.

Under these circumstances a petition was presented by Mrs. *Croxton* and her husband, praying that the sum of £621 Consols, which now represented the legacy of £1000, might be paid to her on her separate receipt. Vice-Chancellor *Bacon* refused to make the order, and the Petitioner appealed from his decision.

Argument.

Cope, for the Petitioner:—

The uniform practice of the Court has been that in the case of a lady of this age the law will presume that there is no possibility of issue. In *In re Widdow's Trusts* (2) one of the ladies was fifty-three years and four months, and the other fifty-three years and nine months old. In *In re Millner's Estate* (3) the lady was

(1) Law Rep. 9 Eq. 404. (2) Law Rep. 11 Eq. 408.
(3) Law Rep. 14 Eq. 245.

C. A. 1878 CROXTON v. MAY.

forty-nine years and nine months. In *Groves* v. *Groves* (1) Vice-Chancellor *Wood* mentioned fifty years as the age below which the Court would presume a woman might have children. In *Forty* v. *Reay*, cited in *Dart's* Vendors and Purchasers (2), the age of fifty-three was considered the limit.

Judgment, James, L.J.

JAMES, L.J.:—

I think that in the particular circumstances of this case the Vice-Chancellor was justified in refusing to make this order. In all the cited cases the lady was either unmarried or had been married for many years without having children. In the present case the lady's married life has practically been only about three years. The appeal must be dismissed.

Brett and Cotton, L.JJ.

BRETT and COTTON, L.JJ., concurred.

Solicitors: *Kingsford & Co.*, agents for *W. J. Cowper, Newbury.*

Ex parte BROWN. *In re* REED.

C. A. 1878 *July* 25; *Aug.* 1, 8.

Bill of Sale—Registration—Mortgage by Joint Tenants—Subsequent Assignment by one of them of his Interest to the other—Bankruptcy of Assignee—Fixtures—Reputed Ownership—Order and Disposition—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

On the 29th of April, 1876, two partners in trade executed a mortgage of their trade fixtures and loose chattels. The mortgage was not registered as a bill of sale. On the 7th of June, 1876, the partnership was dissolved, and the business was thenceforth carried on by one of the two partners alone. On the 29th of January, 1877, the outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mortgage. On the 22nd of March, 1878, the continuing partner filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mortgagee had not demanded possession of the loose chattels, but there was no evidence of any actual consent on his part to the change of possession:—

Held, that the loose chattels passed by virtue of the reputed ownership clause to the trustee in the liquidation.

But *held*, that, as regarded the trade fixtures, the mortgage was, by

(1) 12 W. R. 45. (2) 5th Ed. 345.

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reason of non-registration, void as against the trustee only to the extent of the liquidating debtor's original moiety.

When there is a mortgage of leasehold property and fixtures with a power of sale, the *Bills of Sale Act* applies not only where the power of sale authorizes the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures.

Ex parte Barclay (1) explained.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in bankruptcy.

Percival Reed and *John Scott Cavell* carried on in partnership together the business of *restaurateurs* at *The London*, No. 191, *Fleet Street*. They were assignees of the lease of the house called *The London* (with the exception of a part of it known as the wine office and sample room), the lease having been granted on the 20th of August, 1864, to *Frederick Sawyer*, for the term of thirty-three years from the 24th of June, 1864, and they were, by virtue of an indenture dated the 30th of October, 1871, underlessees of the wine office and sample room for the residue of the same term of thirty-three years, except the last three days thereof. They were also, by virtue of an indenture of the 29th of April, 1876, lessees of the whole of the premises for a further term of ten years, to commence at the expiration of the term of thirty-three years.

By another indenture, dated the 29th of April, 1876, *Reed* and *Cavell*, in consideration of £6500 advanced to them by *John Brown* assigned and demised to *Brown*, his executors, administrators, and assigns, first, all the premises comprised in and demised by the lease of the 20th of August, 1864 (except the wine and sample room); secondly, the wine office and sample room comprised in and demised by the underlease of the 30th of October, 1871; thirdly, all the goodwill and interest of *Reed* and *Cavell* in the business of *restaurateurs* carried on by them on the premises; and, fourthly, all the steam-engines, machinery, and other tenants' fixtures, fittings, decorations, plant, furniture, chattels, and other trade effects: To have and to hold the premises firstly assigned to *Brown*, his executors, administrators, and assigns, for the residue of the term of thirty-three years (except the last ten days thereof)

(1) Law Rep. 9 Ch. 576.

and for all the term of ten years (except the last three days thereof): And to have and to hold the premises secondly assigned to *Brown*, his executors, administrators, and assigns, for the residue of the term of thirty-three years less three days granted by the underlease of the 30th of October, 1871 (except the last seven days thereof), and for all the term of ten years (except the last three days thereof): And to have and to hold the premises thirdly assigned unto *Brown*, his executors, administrators, and assigns absolutely, but subject as to all the premises assigned to a proviso for redemption on payment of £6500, with interest, on the 29th of October, 1876. Whether by accident or by design there was in fact no habendum as to the premises fourthly assigned. The deed contained a joint and several covenant by *Reed* and *Cavell* for payment of the mortgage money and interest thereon, and a power for the mortgagee at any time after the 29th of October, 1876, to sell "the said premises hereinbefore expressed to be hereby assigned and demised respectively, or any part or parts thereof, either together or in parcels," and it was provided that, after any sale or sales should have been made under the power, *Reed* and *Cavell* and each of them, their and each of their executors, administrators, and assigns, or other the person or persons "in whom such of the last days not hereinbefore assigned or demised in the said several terms of years shall for the time being be vested, shall stand possessed of and interested in such last days of the said several terms of years as aforesaid upon trust for the purchaser or purchasers at such sale, and to assign and dispose of the same as such purchaser or purchasers shall direct." This deed was not registered under the *Bills of Sale Act*.

On the 7th of June, 1876, the partnership between *Reed* and *Cavell* was dissolved, and the business was thenceforth carried on by *Reed* alone. On the 29th of January, 1877, *Cavell* assigned to *Reed* all his half part or share in the premises comprised in the mortgage, but subject to the mortgage. On the 22nd of March, 1878, *Reed* filed a liquidation petition, and on the 15th of April the creditors at their first meeting resolved upon a liquidation by arrangement, and appointed a trustee. At the time when the petition was filed the fixtures and the chattels comprised in the mortgage were in the sole possession of *Reed*. *Brown* had not

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demanded possession of the loose chattels, but there was no evidence that he knew of the assignment by *Cavell* to *Reed*. *Cavell* remained solvent. The Registrar made an order declaring that as against *Brown* the fixtures and other chattels formed part of the property of *Reed*.

Brown appealed.

Argument.

Joseph Brown, Q.C., and *Buckley*, for the Appellant:—

The *Bills of Sale Act* does not apply at all; the present case is not within the words of sect. 1 (1), even if, by virtue of *Lord Brougham's Act* (13 & 14 Vict. c. 21, s. 4), the word "person" is to be taken to include "persons." The Act applies only when all the makers of the bill of sale become bankrupt, the goods being in the possession of them all. Otherwise, the result would be, that the goods of a solvent man would be taken away from him and his mortgagee to pay another man's creditors, while he still remains liable upon his covenant to pay the mortgage debt. Such an injustice will not be permitted unless it necessarily results from the language of the Act. If this is the right construction of the Act it would follow equally that if *Cavell* had become bankrupt and *Reed* had remained solvent, the property would have gone to pay *Cavell's* creditors, though in that case *Cavell* could not have obtained credit by means of the possession of the property. The Act does not apply to a case where the property in the chattels has been changed, and there has also been a notorious change in the possession since the execution of the bill of sale. The object of the *Bills of Sale Act* was to benefit the joint creditors of joint makers of a bill of sale, not the separate creditors of one of them.

(1) Sect. 1 provides that every bill of sale of "personal chattels" (which by sect. 7 is to include "fixtures") shall be registered within twenty-one days after the making or giving thereof, "otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy" . . . "be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy" . . . "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

[JAMES, L.J.:—Suppose the real owner of the goods associates a dummy with him as co-grantor in order to evade the Act?]

In such a case the goods would not be the goods of the dummy. The rights of the mortgagee cannot be affected by the assignment subsequent to the execution of the bill of sale. Nothing but an equity of redemption passed from *Cavell* to *Reed*. The effect of the Act is to set aside the bill of sale as if it had never existed, *i.e.*, to benefit the joint creditors of the grantors. At any rate, the bill of sale is valid as regards *Cavell's* original moiety of the property, and *Reed's* trustee can only take a moiety.

But even if the Act applies, the deed did not require registration as regards the fixtures. There is no assignment of the fixtures separately from the house, there being no habendum as to them, and the power of sale does not authorize the mortgagor to sell the fixtures separately from the house. The words which authorize a sale "either together or in parcels" are satisfied by the existence of two leases of different parts of the house, and that this is the true construction of the power is shewn by the trusts declared of the last days of the terms. The case is governed by *Ex parte Barclay* (1), and not by *Ex parte Daglish* (2). In *Ex parte Barclay* (3) Lord Justice *Mellish* said that in the case of a mortgage of household property with fixtures the test whether the mortgage required registration was whether power was given to the mortgagee "to sever the fixtures from the premises and to deal with them and sell them separately."

[JAMES, L.J.:—That is the test only where the question depends upon the language of the power of sale; not where there is a separate assignment of the fixtures.]

There are not two testatums in the deed as there were in *Hawtry* v. *Butlin* (4).

And, as to the loose chattels, the reputed ownership clause does not apply, for though the mortgagee, no doubt, consented to their remaining in the possession of *Reed* and *Cavell*, there is nothing to shew that he consented to their remaining in the possession of *Reed* alone, or that he even knew that they were in his sole

(1) Law Rep. 9 Ch. 576.
(2) Ibid. 8 Ch. 1072.
(3) Law Rep. 9 Ch. 582.
(4) Ibid. 8 Q. B. 290.

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possession: *Ex parte Dorman* (1). As between *Reed* and *Cavell* the former was in possession of the goods as a trustee for himself and *Cavell;* the assignment by *Cavell* to *Reed* was expressly subject to the mortgage. *Cavell* had a right to have the goods applied first in payment of the mortgage debt, just as when one partner goes out of a firm, leaving the other partner in possession of the partnership assets, the doctrine of reputed ownership does not affect the rights of the joint creditors.

[James, L.J.:—In that case there is no consent of the true owner.]

De Gex, Q.C., and *Yate Lee,* for the trustee, were called upon only on the first point:—

If this case is not within the very words of the Act, it is certainly within the mischief of it. Why need the goods be in the possession of every one of the makers of the bill of sale? the words of the Act are satisfied if the goods are in the possession of one of the makers when he becomes bankrupt. *Cavell* allowed *Reed* to remain in apparent possession of the property, and thus to obtain credit, and *Reed* was the sole owner of the goods subject to the mortgage. The Appellant ought to have perfected his title by registration.

Joseph Brown, in reply:—

The words of the Act are carefully chosen; "person making such bill of sale" is not the same thing as "such bankrupt."

Judgment, James, L.J.

Aug. 8. James, L.J.—

The facts of this case are very few and are not in dispute. The liquidating debtor, *Reed,* and his partner *Cavell,* executed a bill of sale of certain chattels in favour of the Appellant, *Brown.* The deed was not registered. *Cavell* afterwards assigned his share in the goods to *Reed,* subject to *Brown's* security. At the time when he filed his petition *Reed* was in possession, or apparent possession, of the goods. The Registrar was of opinion that under these circumstances *Reed's* trustee was entitled to all the goods. It was contended with great ingenuity before us, by

(1) Law Rep. 8 Ch. 51.

Mr. *Joseph Brown* and Mr. *Buckley*, that the *Bills of Sale Act* did not apply to such a case. They said, You must bring yourself within the very words of the Act. The Act says that an unregistered bill of sale is to be void as against the trustee in bankruptcy of the person whose goods are comprised in it as regards any of the goods which at the time of the bankruptcy are in the possession of the person making the bill of sale. Read the word "person" as "person or persons," still the bill of sale was made by *A.* and *B.*, and the goods were found in the possession of *B.* alone. How can it be said that they were in the possession of "the persons making the bill of sale?" If that argument were to prevail, it would, I think, make the Act illusory and misleading. Of course it would be a very simple thing for any one who wished to make a bill of sale to join a mere dummy with himself, for *A.* to make it a bill of sale by *A.* and *B.* Then, when the bankruptcy happens, the goods are found in the possession of *A.* alone, and he could say "it is not within the Act." That would be a very strained construction to put upon the Act. But, on the other hand, it would be monstrously unjust if *A.* and *B.* were jointly possessed of goods and they together assigned those goods to a mortgagee, and *A.* afterwards became bankrupt, *B.* remaining perfectly solvent, having done nothing whatever to which the Act attaches, not being within the Act at all, that then *B.* and his mortgagee should lose the goods entirely because *A.* had become bankrupt. I think, however, that this puzzle which Mr. *Brown* put to us is not so very difficult to unravel if you eliminate from the consideration of it every adventitious circumstance. For instance, we have nothing whatever to do in the present case with any question of order and disposition. We have nothing to do with anything arising out of the partnership which formerly existed between *Reed* and *Cavell*, nor with any title which subsequently to the execution of the bill of sale was passed from *Cavell* to *Reed*. What does the *Bills of Sale Act* really intend to provide? The object of it is to enable the creditors of an insolvent to treat as void a bill of sale secretly made by him. The bill of sale in the present case was made made by *A.* and *B.*, who were joint tenants. It was said that, being joint tenants, each of them was possessed *per mie et per tout*. That of course would be equally true of *Reed* and of *Cavell*. If *Reed* was possessed *per mie et per tout, Cavell*

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was equally possessed *per mie et per tout*. The substantial effect of the bill of sale, putting aside any technicality arising from joint tenancy, was an assignment by *Reed* of his moiety of the goods, which alone he could part with, and an assignment by *Cavell* of his moiety of the goods, which alone he could part with. Then the creditors of *Reed* say, "Your assignment is bad as against us." So it is. Strike out then his execution of the deed altogether as if his signature had been a forgery, as if it had been obtained from him by fraud. Then the deed is bad as against him and his creditors. What would be the result? His creditors would take the half which never passed by the deed, and *Cavell*, or the person who claimed under him, would take the other half. *Reed* was at the time when he filed his petition in possession of the half of the goods which he had purported to assign, but which he had not effectually assigned, by the bill of sale, and the result, according to my view of the case, is that the deed is good as to *Cavell's* original moiety, but it is bad as to the other moiety which *Reed* purported to assign, but which his creditors have under the Act a right to treat as not having been assigned by him.

In my opinion, therefore, the Registrar's order ought to be varied by declaring that *Reed's* trustee and *Brown* are entitled in moieties to the fixtures in question.

Cotton, L.J.

COTTON, L.J.:—

I am of the same opinion.

We have already decided that the fixtures have been so dealt with in this case as to be within the *Bills of Sale Act*, provided that the person claiming them is a person against whom the bill of sale is said by the Act to be void, and provided that the goods come within the description of goods "in the possession of the person making the bill of sale."

I had at first considerable doubt whether the bill of sale must not be treated as entirely void as against the trustee, so as to leave his title entirely unfettered by it. But, upon full consideration, I think that the Act best agrees with the construction that in the present case the trustee can only claim one moiety of the goods.

First let us look at the words of the Act, and in dealing with the question we must construe the Act fairly, not putting a forced

construction upon it, either in favour of the party claiming under the bill of sale or in favour of the general creditors. What is the fair construction of the Act? There are two things to be looked at—the person as against whom the bill of sale is to be void, and the goods in respect of which it is to be void.

The first point is this. A bill of sale not registered, as this was not, "shall as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale under the laws relating to bankruptcy be null and void." I think that that refers to the goods comprised in the bill of sale, the goods which belong to the person who makes the bill of sale and afterwards becomes bankrupt, at the time of the execution of the bill of sale. That in the present case was one moiety only of the goods; the trustee is the trustee of a person who at the time of the execution of the bill of sale was entitled to one moiety only of the goods comprised therein, and the trustee is the person who is entitled to say that as against him the bill of sale is void. Then we come to the latter part of the section, which says that the bill of sale is to be void as regards goods, "which at the time of such bankruptcy shall be in the possession or apparent possession of the person making such bill of sale." I think the fair construction and meaning of that is, goods in the possession of the person whose execution of the bill of sale would, but for the Act, stand in the way of the title of the trustee, and in the present case the debtor's execution would, but for the Act, stand in the way of the title of the trustee as regards a moiety only of the goods. Putting a fair construction upon the statute, and giving to it its fair effect, in my opinion the bill of sale is made void as against the trustee in respect of that moiety only of the goods to which the debtor *Reed* was entitled at the time when he executed the bill of sale.

BRETT, L.J., was present during the argument, but was not present when the judgments were delivered.

The appeal was allowed without costs.

Solicitors for Appellant: *Linklater, Hackwood, & Co.*
Solicitors for Respondent: *Carr, Bannister, Davidson, & Morriss.*

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Liquidation Resolutions—Registration—Bona fides of Creditors—Small Amount of Assets—Assets dependent on Result of Litigation—First Meeting of Creditors—Examination of Debtor—Power of Meeting to overrule improper and irrelevant Questions—Ultrà Vires Resolution—Discharge given to Debtor at Discretion of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.

13 Ch. D. 302
52 L.T. 167
16 Ch. D. 657

Want of *bona fides* will not necessarily be imputed to liquidation resolutions however small the assets immediately available may be, if the debtor has substantial *bonâ fide* claims the subject of pending litigation.

Ex parte Aaronson (1) distinguished.

The debtor, at a meeting of his creditors under a liquidation petition, is only bound to answer proper and material questions, and the meeting has power to prevent the putting of irrelevant or improper questions, or questions which are put, not in the interest of the creditors, but for a collateral object. But the decision of the meeting is subject to review by the Registrar or the Court.

The creditors cannot delegate to any one their statutory power of granting the debtor his discharge. A resolution doing this is *ultrà vires*. But the Registrar or the Court can strike it out and direct the other resolutions to be registered without it:—

Per James, L.J.:—*Semble*, that the effect of rule 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bonâ fide*, the sole judges whether the debtor has given sufficient information as to his affairs.

The statement of affairs of a debtor who had filed a liquidation petition shewed that his unsecured debts amounted to £43,897 and his assets to £120. Besides this, he stated that he had two claims which were being prosecuted in two suits. As to one of them he said that he could not estimate its money value, but that there should be no difficulty in obtaining a very large sum, and as to the other he said that it was a claim for a considerable sum. At the first meeting of the creditors the solicitor and proxy of a company, who had been made Defendants to one of the suits, but who had successfully demurred, and who were creditors for £62, the amount of their costs in the suit, put various questions to the debtor with reference to the claim in that suit. Ultimately the debtor objected to answer one of the questions put, and, on the advice of his solicitor, declined to answer any more questions, on the ground that the examination was really for the purpose of obtaining evidence to assist the Defendants in their defence of the suit. The meeting approved of the debtor's refusal to answer, and resolved that the examination should not be continued. A creditor for £2000, named *Strousberg*, who was present, told the meeting that he would for the benefit of the creditors prosecute the claims at his own risk. The creditors resolved by

(1) 7 Ch. D. 713.

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the proper majority, 1, that the debtor's affairs should be liquidated by arrangement; 2, that *Strousberg* should be appointed trustee without a committee of inspection; 3, that the debtor's discharge should be granted when the trustee should certify his consent thereto in writing; 4, that, having regard to the fact that the matters forming the subject of the questions of the company's solicitor were *sub judice*, the debtor was perfectly justified in declining to answer such questions. The company and the Defendants to the other suit opposed the registration of the resolutions, but the Judge of the County Court decided that they ought to be registered. The decision of the County Court Judge was reversed by *Bacon*, C.J. :—

Held, by *James* and *Brett*, L.JJ. (*dubitante*, *Cotton*, L.J.), reversing the decision of *Bacon*, C.J., that there was not sufficient evidence to shew that the resolutions had not been passed *bonâ fide*, and that they ought to be registered, with the exception of the third resolution, which was *ultrâ vires*.

Per Cotton, L.J. :—It was doubtful whether the creditors, without further information as to the validity of the claims in the two suits, could have been acting *bonâ fide* in passing resolutions not merely for a liquidation by arrangement, but empowering the trustee to fix the time when the debtor should have his discharge.

Statement.

ON the 11th of February, 1878, *William Hope* filed a liquidation petition in the *Chelmsford* County Court. The first meeting of the creditors was held on the 1st of March. The statement of the debtor's affairs then produced shewed that his unsecured debts amounted to £43,897 8*s.* 3*d.*, and that his assets amounted to £120. In addition to this, the debtor stated, under the head of "property," that he had "a claim upon the *International Financial Society* and Messrs. *Anthony Gibbs & Sons*, now being prosecuted in the suit of *Hope* v. *Gibbs*. This claim arises shortly as follows: I was concessionnaire with Mr. *Napier* of the sewage of *London* under the provisions of the *Metropolis Sewage and Essex Reclamation Company Act*, 1865. The *International Financial Society* and Messrs. *Gibbs* guaranteed the capital of the company and made default, whereby I lost all the profits of the concession. I cannot estimate the money value of this claim, but there should be no difficulty in obtaining a very large sum;" and also that he had "a claim for a considerable sum upon the *Romford* Local Board of Health arising out of the sale of the sewage of the town of *Romford*, now being prosecuted in the Chancery Division of the High Court of Justice." The debtor did not in his statement set any money value upon either of these claims. At the meeting Mr. *G. M. Clements*, the solicitor of the *Metropolis Sewage and*

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Statement.

Essex Reclamation Company, creditors who had proved for £61 19*s.* 11*d.*, was present as their proxy. The company had been made Defendants to the suit of *Hope* v. *Gibbs*. They had demurred, and their demurrer was, on the 6th of December, 1877, allowed by Vice-Chancellor *Bacon*, with costs. An appeal was, however, pending from the decision of the Vice-Chancellor. Their proof was for these costs. Mr. *Clements* put various questions to the debtor with reference to his claim in the suit of *Hope* v. *Gibbs*, and ultimately he asked the debtor whether he had any claim before eighteen months ago. The debtor objected to answer the question, and told the meeting that the Defendants to the suit of *Hope* v. *Gibbs* had pleaded the *Statute of Limitations*, and that Mr. *Clements* was trying to get evidence in the suit. Mr. *Clements* then asked the debtor whether he believed that he had any claim against the Defendants before eighteen months ago. After some discussion the debtor, on the advice of his solicitor, declined to answer any further questions on this subject. The majority of the creditors expressed their approval of his refusal, and the chairman, with the assent of the meeting, ruled that the examination must be stopped. Mr. *Strousberg*, a creditor who had proved for £2000, told the meeting that he would, for the benefit of the creditors, prosecute the claims at his own risk. Mr. *Clements* insisted that the questions which he desired to put were material for the purpose of shewing that the claim in the suit of *Hope* v. *Gibbs* was of no value, but he was not allowed to put any further questions. The evidence shewed, in the opinion of the Chief Judge, that other questions put to the debtor, as to the way in which he had been living before he filed his petition, and the mode in which he had disposed of his property, had also been overruled. The following resolutions were passed by the proper statutory majority :—

1. That the debtor's affairs should be liquidated by arrangement and not in bankruptcy.

2. That Mr. *Strousberg* should be appointed trustee without a committee of inspection.

3. That the debtor's discharge should be granted when the trustee should certify his consent thereto in writing.

4. "That, having regard to the fact that the matters forming the subject of the questions of Mr. *Clements* are at present *sub*

judice, it be resolved that the debtor is perfectly justified in declining to answer such questions."

The registration of these resolutions was opposed by the *Metropolis Sewage Company* and by the *Romford* Local Board of Health (who had proved a debt of £2714 12*s.* 11*d.*), both of whom had voted against the resolutions. The ordinary affidavit as to the value of the debtor's assets was made by a clerk of his solicitors, who stated that, after inquiry made by him, and to the best of his knowledge, information, and belief, the amount of the assets did not exceed £200.

Statement.

The debtor made an affidavit, in which he said that he considered his claim in the suit of *Hope* v. *Gibbs* to be of very great value, and that he was offered in the year 1865 the sum of £100,000 in cash for the concession, the subject-matter of the suit, but that he refused the offer, as he considered it inadequate, and had previously agreed to give the *International Society* and *Gibbs & Sons* the refusal of the business, which he accordingly did, and they accepted it. He also said that he was advised and believed that he had a claim against the *Romford* Board for a considerable amount of money. Mr. *Gasquet*, a member of the firm of solicitors for the debtor in the suit of *Hope* v. *Gibbs*, deposed that if the debtor was successful in that suit very large sums of money would be recoverable for his creditors. The Registrar of the County Court held that the resolutions ought to be registered, and his decision was affirmed by the Judge. The opposing creditors appealed to the Chief Judge. That appeal was heard on the 6th of May, 1878.

Winslow, Q.C., and *Charles Hall*, for the Appellants:—

Argument.

The debtor is bound to answer every material question: *Bankruptcy Act*, 1869, s. 125, sub-s. 3; *Ex parte Mackenzie* (1). The questions put by Mr. *Clements* were not immaterial.

The creditors cannot delegate to any one their power of granting the debtor his discharge.

The enormous disproportion of debts to assets shews that the resolutions were not passed in the interest of the creditors, but for

(1) Law Rep. 10 Ch. 88, 91.

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the benefit of the debtor: *Ex parte Staff* (1); *Ex parte Russell* (2); *Ex parte Terrell* (3); *Ex parte Aaronson* (4).

The debtor ought to have been adjudged a bankrupt under sect. 125, sub-sect. 12: *Ex parte Charlton* (5); *Ex parte Marland* (6).

Argument.

De Gex, Q.C., and *E. C. Willis*, for the trustee:—

The debtor was justified in refusing to answer immaterial questions: *Ex parte Mackenzie* (7); and whether questions are material or not, the creditors are the proper and only judges. If the majority of the creditors decide that the examination ought not to be continued, the debtor is not bound to answer further. The power of examination must not be used for collateral purposes. In this case the questions were evidently put in the interest of the Defendants in the action of *Hope* v. *Gibbs*.

The cases in which the debtor's assets were *nil*, or disproportionately small, do not apply here, inasmuch as the value of the claim, though it cannot be estimated, is presumably very large.

Finlay Knight, for the debtor:—

If the resolution as to the discharge is *ultrà vires*, the other resolutions can be registered without it: *Ex parte Ashworth* (8). That case also shews that where an overwhelming majority of creditors resolves that there shall be a liquidation and not a bankruptcy, the Court will not allow bankruptcy to proceed at the instance of a single creditor.

Winslow, in reply.

Judgment. C. J. B.

BACON, C.J.:—

16 Ch D. 657

The questions which arise under this 125th section of the Act are, no doubt, sometimes very difficult, and the difficulties arise principally from the fact that the Legislature has assigned to the creditors a sort of plenary jurisdiction over the subject-matter; but the decisions of this Court in accordance with this enactment

(1) Law Rep. 20 Eq. 775.
(2) Ibid. 10 Ch. 255.
(3) 4 Ch. D. 293.
(4) 7 Ch. D. 713.
(5) 6 Ch. D. 45.
(6) Law Rep. 20 Eq. 777.
(7) Ibid. 10 Ch. 88.
(8) Ibid. 18 Eq. 705.

have always also exercised a very salutary jurisdiction for the purpose of ascertaining whether the resolutions which may have been come to are, as is called, *bonâ fide;* whether they are in fact resolutions in favour of the debtor and without due regard to the common interests of all the creditors. That is the point which is raised on this appeal, and that is the thing that I have most attentively to consider and ultimately determine. [After referring to the statement of affairs, his Lordship continued:—]

That is all the information which he gives to his creditors at the meeting. Those are the materials upon which their discretion and will are to be exercised; and then, having that statement before them, they resolve that there shall be no bankruptcy, and that the debtor's affairs shall be liquidated by arrangement. Then they appoint a trustee without a committee of inspection—that is to say, they hand over to the trustee the entire management and realization of any estate that the debtor possesses, adding something, moreover, foreign to their powers, for they give to the debtor his discharge whenever the trustee may think fit; and without any application to them, without any further explanation to them, without any knowledge of how there is to be a realization of the assets, they proceed at once, and transfer to the trustee an arbitrary power of giving the debtor his discharge.

In my opinion that is not consistent with the statute. That is not consistent with the principles of the administration of the law in bankruptcy. There is no guarantee that any step shall be taken by the so constituted trustee to realize the estate. It is said that he stated that he would at his own expense prosecute the claims in the actions for the benefit of the creditors. He might withdraw from that whenever he liked, for it is not binding on him, or in any way beneficial to the creditors. For anything that might happen, or that they could prevent, the day after the registration of these resolutions Mr. *Strousberg* might have discharged the debtor from all his debts, and he might, moreover, have forborne to take any steps to prosecute those claims which are subjects of the suits now pending. I cannot think, looking at the cases decided, that this was the exercise of the honest discretion which the statute contemplated when it gave the creditors power by a majority to bind the minority. I cannot think that any such

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resolutions are lawful. Where do I find in the statute, or where do I find any precedent in the cases decided in bankruptcy, of any persons, whether creditors or not, constituting an individual to be trustee, manager, and owner—having all the powers that the law possesses over the subject-matter of this estate—to sue for, or to forbear to sue for—or whether he sues for or not—to discharge the debtor from all those obligations?

I do not think such resolutions are valid against the minority.

Now it is not necessary to say a great deal more about the questions which were put at the meeting. The question is this—the statute says that the debtor shall answer all that he is required to answer. Is it in the power of a majority of creditors to say, "We resolve to repeal that clause in the statute, and we say, You shall not be required. We won't require you—we, the majority?" It may happen, as it has been said, that there may be a majority of friendly creditors. I need not consider that here—whether they were, or to what extent they were friendly creditors; but they did resolve that the debtor should not answer the questions which had been put; and the resolution which they pass, and which is supposed to bind the minority, neutralizes an Act of Parliament, which entitles the creditors to such information as they may require. The reason the creditors give is that the matter is *sub judice*. I have attended to the examination, and it may be said with an appearance of plausibility, though I do not think with any great sincerity, that some of these questions might go to the suggestion as to whether the *Statute of Limitations* had barred the debt, or that there might have been some advantage attained from the answers to the questions. But he was asked (among other questions) how he had been living all this time. When he filed his petition he had only £120 in the world, and that not accessible. He was asked, "How do you come here, owing at this time £43,000 of debts; we desire to know what you have been doing?"

That inquiry is stopped by a resolution of the majority under the notion that it was *sub judice*. That question was not *sub judice*. Surely the creditors, when the debtor calls them together to state his affairs to them, and to ask their forbearance, or their view of the mode of dealing with his property, are entitled to information from him what he has been doing during some period (perhaps eighteen

months, or perhaps two years), and what has become of his property, and if he has spent it they have a right to say "Tell us how." If those questions had not been stopped I cannot tell what the result of them might have been, but the minority have been stopped from putting such questions, and stopped by the omnipotent voice of the other creditors.

That is the state of things upon that part of the case. Then how can I say that this is really an exercise—an honest and lawful exercise—of that power which the statute gives the majority, when I find that the consequence is to shield this debtor from the necessity of giving that explanation (because it cannot be pretended that he has put forward any explanation) of what he has been doing with his assets during any period preceding his bankruptcy which the creditors have a right to require? How can I avoid the conclusion that it cannot be referred to anything but a friendly and partial motive, and that it cannot be a discharge of that duty which is cast on all creditors, viz., to insure the due distribution of their debtor's assets, and to promote a fair investigation into the manner in which he dealt with his estate before he filed his petition? So much for the good faith of it. But when the proportion of assets to debts is looked at the thing is ridiculous. It is the proportion of £120 assets to £43,000 of debts. It is too obvious. The disproportion is greater than in any of those cases where the Court held that proceedings apparently invoking the aid of the bankruptcy law for due administration in bankruptcy were merely proceedings on behalf of the debtor. I cannot discover from the evidence before me anything more than a plain intention on the part of the debtor to get relieved from his debts, and as plain a disposition on the part of the creditors who voted in the majority to assist him in that desire.

In my opinion it is altogether wrong to say that there was not a partial exercise and an unlawful exercise of the powers of the creditors at the meeting. Not only had they no power to stop inquiry, but they could not properly transfer to Mr. *Strousberg* that authority which they proposed to delegate to him in addition to his power to act as trustee in the realization of the estate if he thought fit to realize it, namely, the authority to give the debtor his discharge if he thought fit the day after.

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That being so, a clear act of bankruptcy has been committed if the resolutions cannot be duly registered; and as, in my opinion they ought not to have been registered, for the reasons I have given, then bankruptcy is the only alternative, because, by the debtor's own confession, bankrupt he is; he is unable to pay, he has nothing to pay with. Under bankruptcy, the trustee properly appointed will have the opportunity of inquiring into these claims and of suing for them if there is anything to be sued for, and of getting from them for the debtor's estate anything that can be got.

And there is this, moreover, that the creditors under the bankruptcy will have the right to put the debtor under a fair investigation, and to examine him—which, if these resolutions stand, he would effectually escape from, there being no reason shewn why he should escape. Mr. *De Gex's* argument did not enter into that topic or deal with it at all, but with me it has very considerable weight, for it is the right of creditors under the Act, whether the bankruptcy is initiated by a petition for liquidation or otherwise, to have a full explanation from the debtor of the manner in which he has dealt with his property previously to his presenting his petition or to the adjudication of bankruptcy.

I am of opinion, therefore, that the order by which these resolutions were directed to be registered was erroneous and ought to be discharged. I think, moreover, upon the evidence before the learned Judge, that an adjudication of bankruptcy ought then to have been made, and I make the adjudication now.

C. A. From this decision the debtor appealed. The appeal was heard on the 20th and 21st of June, 1878.

Argument. The Appellant in person:—

There is nothing to shew that the resolutions were not passed *bonâ fide*. A creditor is not entitled to put irrelevant questions: *Ex parte Mackenzie* (1). Sect. 125, sub-sect. 3, enables the meeting to dispense with the attendance of the debtor; it follows that they must have power to dispense with answers to questions put to him. I did not ask the creditors to give me a discharge, and I am quite willing that the third resolution should be struck out.

(1) Law Rep. 10 Ch. 88.

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Winslow, Q.C., and *Charles Hall*, for the opposing creditors:—

There is nothing to shew that the claims in the two actions have any substance in them. The only tangible asset is the £120, and that is practically nothing compared with the liabilities. Under such circumstances the petition is a mere abuse of the procedure of the Court, and the resolutions ought not to be registered: *Ex parte Aaronson* (1); *Ex parte Russell* (2); *Ex parte Page* (3); *Ex parte Terrell* (4); *Ex parte Staff* (5). The debtor is bound to answer every material question as to his affairs. The questions put by Mr. *Clements* were important with regard to the value of the claim in the action of *Hope* v. *Gibbs*. The examination ought not to have been stopped. The proper time for investigating the debtor's affairs is at the meeting: *Ex parte Levy* (6); *Ex parte Walter* (7). It must be shewn that the questions were not put *bonâ fide*. Mr. *Clements* was not the solicitor for the defendants in *Hope* v. *Gibbs;* his clients had been dismissed. There is no guarantee that the trustee will prosecute the claims; he is not bound by what he said at the meeting. The affidavit made on the application to register, that the assets are not worth more than £200, shews that the proceedings are not *bonâ fide*. And the power given to the trustee to discharge the debtor is very strong evidence of want of *bona fides*. That resolution, at any rate, is *ultrà vires;* the creditors could not delegate their power.

The Appellant, in reply:—

Ex parte Aaronson and *Ex parte Russell* are distinguishable. None of the *bonâ fide* creditors can gain anything by driving me into bankruptcy.

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JAMES, L.J.:—

I am of opinion that the decision of the County Court Judge ought to have been affirmed, and that the decision of the Chief

(1) 7 Ch. D. 713.
(2) Law Rep. 10 Ch. 255.
(3) 2 Ch. D. 323.
(4) 4 Ch. D. 293.
(5) Law Rep. 20 Eq. 775.
(6) Ibid. 11 Eq. 619.
(7) 2 Ch. D. 326.

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Judge reversing that decision ought now to be reversed. With regard to one of the resolutions, that which allows Mr. *Strousberg* to give the debtor his discharge, it is admitted that it must be struck out, but it may have an effect upon another part of the case. There is no suggestion against Mr. *Strousberg's* character or position, but whatever may be the motive which induced the creditors at the meeting to give him the power of granting the debtor's discharge, it appears to me that that is not a thing which can be done under the Act of Parliament. I am of opinion that the meeting could not delegate either to a committee, or to the trustee, or to any other person the power of granting the discharge, which might have been granted at that meeting or at any subsequent meeting duly convened under the Act.

Then the question really is, whether, striking out that resolution, the other resolutions come within the principle laid down in the several cases to which our attention has been called, in the decision of all or many of which I took part myself. All of them are merely illustrations of this legal principle, that resolutions of creditors, or the majority of creditors, for liquidation by arrangement or composition, or anything of that kind, cannot stand if the Court comes to the conclusion upon the facts that the resolutions have not been passed *bonâ fide* for the purpose of the administration and distribution of the debtor's assets, but have been come to, without any reference to the chance or the hope of any such distribution, for the sole purpose of giving the debtor his discharge earlier and upon easier terms than in a bankruptcy, and without exposing him to the consequences of a bankruptcy. That is the principle. The question is, whether the facts of the present case are such as to satisfy the Court, or to enable it to arrive at a judicial conclusion, that the meeting were acting *malâ fide* (not *malâ fide* in one sense), that they did not act really, and truly, and substantially for the purpose of determining what was best to be done with regard to the debtor's assets, and the mode of administering them, but that what they did was done out of friendship towards the debtor. The Chief Judge seems to have based his conclusion principally upon the refusal of the debtor to answer certain questions which were put to him at the meeting by Mr. *Clements*, who was there nominally representing a company who are creditors for

£60, and who have been substantially fighting the matter before the County Court Judge, before the Chief Judge, and before us.

Now, with regard to that, it is important to state what in my view is the right course to be taken at these meetings. Sect. 125 of the Act says that the debtor shall be present at the meeting at which the special resolution is passed, unless prevented by sickness or other cause satisfactory to the meeting, and shall answer any inquiries made of him. Therefore, to start with, the meeting has an absolute power of dispensing with the attendance of the debtor upon sufficient cause. If he is there he is to answer inquiries. And, beyond all question, he ought to answer any questions properly and honestly put to him, put really for the purpose of assisting the meeting in arriving at a conclusion with regard to those things upon which they are then and there to determine. But it is not the meaning of the Act that any person representing any creditor may ask any questions at any length, for any number of hours, or for any purpose whatever not connected with the object of the meeting, but for some ulterior purpose of his own. If that were so you might have a person going on with an examination for six or for twelve hours from day to day, and who might by a course of obstruction of that kind render it utterly impossible for the meeting ever to come to any conclusion. Therefore it seems to me quite obvious that the meeting or their chairman, or the meeting through the chairman, acting within proper limits and exercising their judgment honestly and properly, must have that power of discipline which, as it seems to me, is necessarily incident to such a body. That is to say, they may come to a conclusion, if they do so honestly, that questions are put for the purpose of obstruction or delay, or that they are put for the purpose of making out a case in some criminal or civil Court against some one, or to enable the questioner to make a defence in such proceedings. If the meeting or the chairman should really come to that conclusion, and should say that the examination has gone far enough, and if the questions which have been fairly and properly put have been fairly and properly answered, it seems to me there must be a power in the meeting, or in the chairman with the assent of the meeting, to interpose and prevent the putting of useless and perseveringly vexatious questions for some indirect purpose. Of

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course the conduct of the meeting and of the chairman in that respect is always liable to be called in question, and it must be exercised with the knowledge that it is capable of being called in question before the Registrar or before the Court. Of course they must not stop proper questions, they must not stop questions too hastily, and they must not intefere so as to prevent a proper investigation of the debtor's affairs. But, within that limit and subject to that supervision and control, it seems to me that they have the power of determining upon the materiality and propriety of the questions.

In this case, having heard read the note of what passed at the meeting, so far as the shorthand writer was able to take it, by reason, as he says, of the noise and hubbub of the meeting, I am of opinion that the debtor was well advised in not answering the questions, and that the meeting came to an honest and proper conclusion that the questions ought not to be put. I think I should have come to the same conclusion, if I had been present at the meeting, that the examination by Mr. *Clements* had been carried far enough, and that it was time to put a stop to that which was either a waste of time, or was being done for the purpose of getting up a defence to the suit which was then pending.

Then, if there is no objection to the resolutions on that ground, there comes the question as to the nature of the assets and the debts. It is said that the only available assets are £120, except those claims in certain Chancery suits which are alleged to be of very large value. It is said that they are mere idle claims. Their value is hardly a thing which can be tried here, but one of the claims is for many thousands of pounds. At all events there is this to be considered, that counsel must have drawn the bills in the suits, and solicitors must have thought it worth while to prosecute them. And, further, this struck me as being very important. A creditor at the meeting said, "I am willing to accept the office of trustee and to prosecute these suits at my own risk." The impression upon my mind is, that the whole contest really was whether there should be a liquidation by arrangement, with a trustee who would prosecute the claims against the persons who were supposed to be liable, or whether the matter should go into

bankruptcy, and that the real object of the Defendants to the suits was to throw every difficulty in the way by means of proceedings in bankruptcy; to throw every difficulty in the way of the prosecution of the suits. And, speaking for myself only, I cannot help thinking that the question is, whether the Defendants to those suits shall be able, by the short course of breaking up the resolutions, to put a stop to the litigation. I cannot say I am satisfied whether the claims will prove to be substantial. Of course any litigation may fail. But I can easily conceive the case of a man who has no assets to shew, but who may say, "I am entitled to property worth £20,000 a year. There is a will which I am contesting. My assets really consist of valuable estates, if I can obtain my inheritance, and if I can succeed in upsetting a will." I do not think it is a sufficient ground for saying that a debtor cannot have his affairs liquidated by arrangement, but must go into bankruptcy, if his assets are of such a character that this may possibly turn out to be mere moonshine. It is suggested that these claims are quite idle. That may be so. But it seems to me that the meeting had all the necessary materials before it. There was nothing to prevent Mr. *Clements*, or any one else present, from reading the bills and the answers in the suits for the purpose of satisfying the meeting that the claim was idle nonsense and mere moonshine. I think, therefore, that we cannot listen to the statement that there are practically no assets whatever. Then, if that is so, it seems to me that it was only right and *bonâ fide*, and the best thing they could do, to appoint a trustee who would prosecute the claims and endeavour to make something for them, and they had a right under the Act to do this.

Then there is this other matter, which no doubt will throw some light upon the question of the *bona fides* of the creditors. I mean the resolution giving Mr. *Strousberg*, the trustee (I do not know whether he is or is not a personal friend of the debtor), the power to grant the debtor his discharge when he should think fit. That may be to some extent evidence, but I do not think it is of itself sufficient evidence of anything like a want of *bona fides* and proper care for the creditors *quâ* creditors. The meeting could, if they had thought proper, have granted the debtor an immediate discharge. According to my experience an immediate

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discharge is always granted where the debtor has given up the whole of his assets, and nothing is expected to come in at a future time. I think an immediate discharge is invariably given if the creditors fancy there is nothing to prevent the debtor from going out into the world again to make what he can. They did not do that in this case, but what they did may have been honestly done, and I do not see any reason for saying that it was not honestly done. They said, We won't give you your discharge now, these claims must be prosecuted, and Mr. *Strousberg* says he will prosecute them. If he is satisfied with your conduct, and thinks that you have done all you can to enable him to proceed, then, if and when he is perfectly satisfied that everything has been done that could be done, we will give him the power of granting your discharge. I have already expressed my opinion that that was not a valid delegation of authority to Mr. *Strousberg*. But the fact that such a delegation was given is not, in my opinion, of itself sufficient to shew that the resolutions were not passed *bonâ fide*, and to compel us to say judicially they could not have been passed by the meeting acting in the *bonâ fide* exercise of their statutory power of determining what was to be done for the benefit of the creditors. For that, after all, is the question which, according to my view, we have to decide. Being, therefore, of opinion that there was nothing amounting to *mala fides*, that is to say, that there is nothing to shew that the majority were acting in disregard of the interests of the creditors *quâ* creditors, I think that the resolutions ought to be registered, with the one exception which I have mentioned.

Brett, L.J.

BRETT, L.J.:—

The question is, whether the resolutions ought or ought not to have been registered. I think that they ought to have been registered, unless it could be shewn that the conditions precedent to the right to pass them were not fulfilled, or unless those creditors who impeach them can shew that the resolutions were passed, not with the intent of deciding what was fairly right and just as between all the creditors and the debtor, but with the intent, without due regard to the interests of all the creditors, of aiding and indulging the debtor. It seems to me that those who propose

to impeach the resolutions on the latter ground have the burthen of proof upon them.

Three circumstances are mainly relied on in order to shew that the resolutions can properly be impeached, viz., the want of substantial or any assets, the improper refusal of the debtor to answer certain questions, or the improper overruling of those questions by the majority of the creditors present at the meeting, and the fact that power was given to the trustee to discharge the debtor.

Now, with regard to the first of these circumstances, if it had been shewn that the claims in the suits were of no value, so that the only assets would have been £120, or under £200, the debts being over £40,000, and that it would have been impossible, therefore, that there could be any dividend forthcoming, then I should have thought that we ought to follow the course adopted in the cases which have been cited, and to come to the conclusion (as a matter of fact) that the resolutions could not have been passed with a due regard to the interests of all the creditors, but that they must have been passed without regard to those interests in aid of and to indulge the debtor. But, unless it is shewn that the claims under those suits in the Chancery Division are mere idle claims, it cannot be said that the assets are not substantial; and if those claims are valid, then there may be a substantial dividend. Therefore it seems to me that the circumstances of this case are not such as to bring it within the principle of the cases which have been cited. If that be so, the first ground of objection is gone. But the materiality of knowing what were the chances of success in the suits shews that questions with regard to those assets were very important questions.

Now, as to the second matter, the objection that the questions put were not answered. If the debtor improperly refused to answer questions, then he did not fulfil the conditions of the 3rd sub-section of sect. 125, for by that sub-section he is bound to answer any inquiries made of him. I cannot think that we must give that phrase the wide interpretation for which Mr. *Winslow* contended, and that the debtor must answer any questions that anybody can possibly ask him. I gather from the judgment of this Court in *Ex parte Mackenzie* (1), that the proper limitation of

(1) Law Rep. 10 Ch. 88.

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that phraseology is this, namely, that the debtor is bound to answer all proper and material questions. Therefore, if the debtor refuses to answer any proper and material question, it seems to me that he has not fulfilled the condition precedent, and has no right to have the resolution passed. And my present impression is that this would of itself be a good ground for setting aside the resolutions, although they might afterwards have been passed *bonâ fide* on the ground that the conditions precedent had not been fulfilled. The point therefore arises whether the debtor did refuse to answer any questions which were either proper or material, and the same point will arise with regard to the overruling of the questions by the majority of the creditors.

I agree with the Lord Justice that some one at the meeting must uphold its discipline, and, inasmuch as the chairman is not a judicial officer, I suppose that if any question is asked, and it becomes necessary to consider whether it ought to be allowed, it is not for the chairman alone, but possibly for the meeting to decide. And I incline to think that, if the meeting were to decide wrongly, although *bonâ fide*, there might be grave objections to registering the resolutions afterwards. The creditors at the meeting are the persons to decide for the time being, but I think they decide at their peril, just in the same way as the debtor when he refused to answer did so at his peril. The question, therefore, is, whether the questions, which the majority of creditors decided that the debtor ought not to answer, and which he refused to answer, were proper and material questions.

If those questions had been asked by or on behalf of any creditor who had not been a Defendant to one of the suits, I should have thought they were proper questions, and questions which ought to have been answered. There could have been no reason for supposing that they were asked otherwise than with the view of assisting the creditors. But I think we must look not only at what the questions were, but at who the person was who asked them. Now, the particular questions one would have expected to be asked in this case for the purpose of assisting creditors would have been, what was the nature of the claims in these suits, what evidence the debtor had in support of them, and what was the amount he expected to be realized. None of those questions were

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asked, I presume in a great measure because Mr. *Clements* knew perfectly well what the nature of the claim in *Hope* v. *Gibbs* was. He probably knew the contents of the bill in that suit, and therefore did not want to have any information about them. It does not follow that all the other creditors knew the contents of the bill, and so, if he wished to assist them, one would have thought he would have endeavoured to obtain from the debtor the circumstances to which I have alluded; but he did not. The questions which he did ask, and which he pressed, were questions which, to my mind, could not in any way assist the creditors in coming to a conclusion as to the value of the claim, but could only assist the Defendants when the suit came to be tried. The obvious purpose of the questions was to obtain admissions from the debtor, which could be of no use to the meeting, but which might be of use to the Defendants.

Then it is said that Mr. *Clements* was not acting for the Defendants. If he was only acting on behalf of his own clients in respect of their debt of £60, I can see no sense or meaning in the questions. He was, he said, the friend of Sir *William Drake;* Sir *William Drake* was the solicitor for the Defendants to *Hope* v. *Gibbs,* and as a matter of fact, I am clear, I confess, beyond all doubt, that these questions were asked by Mr. *Clements* in order to assist his friend Sir *William Drake,* and by means of him to assist the Defendants. If these questions were not asked by a creditor in order to inform himself and the other creditors, but if they were asked on behalf of an alleged debtor to the estate, not for the purpose of instructing the creditors whether there was any value in the claims, but *alio intuitu,* merely in order to make out a defence to the suit, it seems to me that they were not proper questions, and not material questions for the purpose in hand. Where a witness is being examined in an action, not for the purposes of the action in hand, but in order to get admissions from him as to another action pending, I have known Judges over and over again overrule the questions, and if I had been acting judicially at this meeting, I should have thought it my duty to overrule these questions, on the ground that they were not asked *bonâ fide* for the purposes of the matter in hand, but for another and a different purpose. If that be so, I think the debtor was

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justified in not answering, and that the meeting was justified in overruling the questions, and what they did rightly cannot be any evidence that they were acting otherwise than *bonâ fide* and as they ought to have acted.

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With regard to the power given to the trustee to discharge the debtor, I think that is a circumstance which we ought to consider gravely, and no doubt it is a circumstance which might, if anything else were added to it, shew strongly that the resolutions were passed in favour of the debtor, and not with the intent to decide fairly between him and all the creditors. But, where that is the only circumstance which is against the resolutions, I do not think it is enough to shew that they were not passed *bonâ fide*. I think it was wrong to pass that particular resolution, but I do not think it shews that the resolutions were not passed with the proper intent.

Therefore, taking each of the circumstances which has been relied upon, and taking them altogether, I do not think they shew that the conditions precedent were not fulfilled, or that the resolutions were not passed with the proper intention. The resolutions ought therefore to be registered with the exception which the Lord Justice has pointed out. Even if that resolution was not *ultrà vires*, as I am inclined to think it was for the reasons given by the Lord Justice, I think it is one which ought not to be allowed. Mr. Registrar *Murray* tells me that it is the practice, and I should say it is not an improper practice, that when resolutions are brought in for registration, one of which ought not to have been passed, the Registrar does not conceive himself bound to reject all the resolutions on account of one being improper, but registers those which are right, rejecting the one which is not. Therefore the Registrar in this case might have registered the resolutions with the exception of that one, and if so, upon this appeal we are bound to do what the Registrar ought to have done, and therefore we ought now to say that the resolutions should be registered, with the exception of that one which gave to Mr. *Strousberg* the power of granting the debtor's discharge.

Cotton, L.J.

COTTON, L.J.:—

I must confess that I have considerable doubt, and I am not

prepared at the present moment to concur in the opinion which has been expressed by the Lords Justices; but, as they both agree that the order appealed from ought to be discharged, I do not think it necessary that the case should stand over to enable me further to consider my judgment. I have very considerable doubt whether the order of the Chief Judge was not right. Of course the majority decides. But, though I differ from the Lords Justices, it is in no way with regard to the principle on which the case is to be decided; if it had been, I should have desired the case to stand over for further consideration.

The principle, I take it, is this: The Act having given a very large power to the majority of creditors to bind the minority, the Court has to consider whether or not the forms prescribed by the Act have been followed, and, further than that, whether or not the resolution of the majority has been fairly come to for the purpose of providing for the distribution of such estate of the debtor as the creditors can fairly ask for, or whether it has been passed from a friendly feeling towards the debtor. I need not say that in the present case there is no question as to anything fraudulent having been done, but I have a doubt whether or no, having regard to the resolutions and to what took place at the meeting, it can be said that the resolutions were fairly passed with the object I have mentioned, namely, of obtaining the distribution among the creditors of such portion of the estate as they can fairly claim to have given to them.

The Chief Judge seems to have proceeded very much upon the stopping of the questions. I think it right to say that I agree in the opinion expressed by the Lords Justices as to the debtor's refusal to answer the further questions which were stopped. It is not that which raises the doubt in my mind. I cannot for a moment accede to the proposition that the debtor is bound, at the peril of having the resolutions set aside, to answer every question that may be put to him. As I understand the Act, he is bound to answer such questions as are put to him for the purpose of elucidating the statement of his assets and liabilities which is put before the meeting. And, if these questions had been put for the purpose of shewing that the claims in the two suits (claims consisting almost entirely of unliquidated damages) were unsub-

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stantial and imaginary, I should have been of opinion that the meeting stopping those questions could not pass resolutions binding on the dissentient minority. But, for the reasons already stated by the Lords Justices, I cannot look upon those questions as put for that object.

But what has caused my doubt is this, and I think it right to state it, although I do not positively dissent from the judgment or desire that the case should stand over for further consideration.

This statement of assets is laid before the meeting for the purpose of getting a liquidation arrangement agreed to and the debtor's discharge granted. It shews only £120 as available assets, and the only other assets are certain claims almost entirely for unliquidated damages, and there is certainly no information which really shews whether or no the claims are of any substantial value. My doubt is this, whether we can consider that statement as shewing more than £120 available for the creditors, and, that being so, whether, without further information, the meeting was justified in passing resolutions, which determined not only on a liquidation by arrangement, but also that when Mr. *Strousberg* should be of opinion that the debtor's discharge ought to be granted it should be granted. The effect of that would be to put it in the power of Mr. *Strousberg* to fix the time after which no property acquired by the debtor could be made available for his creditors, and, although the resolution which gave that power is not to be registered (and probably it would be ineffectual if it was), yet, to my mind, it throws considerable doubt, having regard to the debtor's statement made at the meeting, upon the whole of the proceedings, whether they can be considered to have been taken for the benefit of the creditors and the distribution of such property as ought to be divided among them, and whether, therefore, the resolutions ought to be registered. I have certainly considerable doubt whether that does not bring the case within that principle which would entitle, or rather require, us to say that the resolutions ought not to be registered, and that the dissentient minority ought not to be bound by them.

JAMES, L.J.:—

I desired to mention a point which I omitted in giving my

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judgment. The point was not argued. It has reference to rule 301, which provides that "the passing of a special resolution (in the case of liquidation by arrangement) shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs required to be submitted to the general meetings of his creditors." That is very general in its terms, and I am disposed to think it means that, if the debtor honestly gives to the meeting, and the meeting determines that he has given, all the information that ought to be given, that is to be conclusive. Of course that would not affect any question of *mala fides* in the conduct of the meeting.

We annul the adjudication. The Appellant will have his costs of the appeal and of the hearing before the Chief Judge. The deposit will be returned.

Solicitors for Appellant: *Piesse & Son.*
Solicitor for opposing Creditors: *G. M. Clements.*

Ex parte CRAWCOUR. *In re* ROBERTSON.

C. A. 1878 *June* 27.

Bill of Sale—Registration—Agreement for Hire and conditional Sale of Furniture—License to seize—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

R., on the 29th of November, 1877, entered into an agreement with *C. & Co.* to hire some furniture from them, which was admitted to be of the value of £63. *R.* was to pay *C. & Co.* £10 on the signing of the agreement, £5 on the 4th of January then next, and £5 on the 4th of each succeeding month during the continuance of the agreement, and he was also on the signing of the agreement to deposit with *C. & Co.* promissory notes for the total amount of the instalments as collateral security, and without prejudice to their title to the furniture and to their rights under the agreement. In case of the furniture being seized by them under the agreement, the notes, or so many of them as should then be current, were to become void. In the event of non-payment of any of the notes when due *C. & Co.* might seize, remove, and retake possession of the furniture as in their first and former estate, notwithstanding any payments made by *R.*, which payments were then to be forfeited to *C. & Co.* Upon payment by *R.* to *C. & Co.* of the full amount of £66 by the above instalments the furniture was to become his

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property, but, until the whole of that sum had been paid, the furniture was to remain the sole property of *C. & Co.*, and was only let on hire to *R.*

The furniture was delivered to *R.* and he gave the promissory notes. On the 9th of January, 1878, he filed a liquidation petition, under which a trustee was appointed, who took possession of the furniture, which was then in *R.*'s house. On the 19th of March, some of the monthly instalments being overdue, *C. & Co.* seized the furniture:—

Held (reversing the decision of the Registrar) that the property in the furniture did not pass to *R.* until payment of the full amount of the instalments, and that consequently the agreement did not amount to a bill of sale by *R.*, and did not require registration.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 29th of November, 1877, an agreement in writing was entered into between *W. A. Robertson*, a trader, of the one part, and *Lewin Crawcour & Co.*, upholsterers, of the other part, which contained the following provisions:—

(1.) That *Lewin Crawcour & Co.* thereby let to *Robertson*, and he thereby hired of them the several articles of furniture and effects belonging to them mentioned in the schedule thereto, and which were admitted by *Robertson* to be of the value of £63 4*s.* 10*d.*, adding thereto 5 per cent. on the said value less the amount of first instalment.

(2.) "The said articles of furniture and effects are hired by *W. A. Robertson* upon the following terms and conditions:—

(3.) "*W. A. Robertson* is to pay to *Lewin Crawcour & Co.* the sum of £10 on the signing hereof, £5 on the 4th of January next, and £5 on the 4th day of each succeeding calendar month during the continuance of this agreement, and is also on the signing hereof to deposit with *Lewin Crawcour & Co.* promissory notes for the total amount of the instalments to be paid hereunder, such promissory notes being given as collateral security, and entirely without prejudice to the title of *Lewin Crawcour & Co.* in or to the said furniture and effects, and of all rights reserved to them by this agreement, and subject to this stipulation, that, in case of the goods being seized and removed by *Lewin Crawcour & Co.* under clause 5, the whole of such promissory notes, or so many of them as shall then be current, shall after such seizure and removal be given up on demand to *W. A. Robertson*, and shall from and after such seizure and removal become absolutely void.

(4.) "*W. A. Robertson* is to keep the rent of the premises in which the said furniture and effects are placed regularly and punctually paid, and not to part with possession of, remove, or otherwise deal with the said goods, or any part thereof, nor to part with the possession of, or assign his interest in, the house or premises wherein the said goods may be, without the consent in writing of *Lewin Crawcour & Co.* being first obtained.

(5.) "In the event of non-payment of any of the above notes on the days upon which they respectively become due, or of the breach of any of the conditions herein expressed to be performed by *W. A. Robertson*, or in case the said furniture and effects, or any part thereof, shall be seized or taken in execution under any process of any Court either of law or of equity, *Lewin Crawcour & Co.* may by themselves, or others, their servants or agents, enter into any house or place where the said articles of furniture or any of them shall then be, and seize, remove, and retake possession of the same, as in their first and former estate, notwithstanding any payments made by *W. A. Robertson*, and *Robertson* shall be barred from commencing or maintaining any action of trespass or otherwise by reason of such taking possession as aforesaid, or of the temporary possession of the premises wherein the said goods may be, for such time as may be reasonably occupied in such removal, or for the recovery of any part of the moneys paid under this agreement, which, upon such default or breach as aforesaid, it is hereby agreed are to be absolutely forfeited to *Lewin Crawcour & Co.*

(6.) "Upon payment by *W. A. Robertson* to *Lewin Crawcour & Co.* of the full sum of £65 17*s.* 10*d.* by the instalments aforesaid the agreement shall be deemed completed, and shall thenceforth cease and determine, and the said furniture and effects shall become and be the property of *W. A. Robertson;* but until the whole of the said sum shall have been paid the said articles of furniture and effects shall remain the sole and absolute property of *Lewin Crawcour & Co.*, and are only let on hire to *W. A. Robertson*, who hereby agrees to take all proper care of the same during the hiring, and, in case of damage by fire or otherwise, *W. A. Robertson* will bear the loss or risk."

The articles mentioned in the schedule to the agreement consisted of ordinary household furniture. Soon after the execution

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of the agreement they were delivered at *Robertson's* private residence. On the 9th of January, 1878, *Robertson* filed a liquidation petition, under which a trustee was appointed, who, on the 26th of February, took possession of the furniture comprised in the agreement of the 29th of November, 1877, which was still in the debtor's house, and remained in possession of it until the 19th of March, 1878, when *Lewin Crawcour & Co.* took possession of it. The instalments of rent due in February and March had not been paid. On the 22nd of March the trustee obtained from the Court of Bankruptcy an injunction restraining *Lewin Crawcour & Co.* from removing the furniture, and the injunction was continued from time to time. On the 30th of March the trustee gave notice of an application to the Court for an order declaring that the furniture formed part of the property of the debtor divisible among his creditors, and belonged to the trustee. This application was heard on the 24th of May, 1878. On behalf of the trustee it was contended that the hiring agreement was void as against him, because it had not been registered under the *Bills of Sale Act*, 1854; and, moreover, that he was entitled to the furniture as being, at the commencement of the liquidation, in the order and disposition of the debtor, with the consent of the true owners. On the latter point a number of affidavits were filed by *Lewin Crawcour & Co.* to prove that there is a notorious custom of letting furniture upon terms similar to those of the agreement of the 29th of November, 1877, and it was said that this custom excluded the operation of the reputed ownership clause. These affidavits were answered by a number of affidavits filed on behalf of the trustee, which denied the existence, or at any rate the notoriety, of any such custom. The Registrar held that the agreement ought to have been registered as a bill of sale, and that, by reason of its non-registration, it was void as against the trustee; and on this ground, without going into the question of order and disposition, he made the order asked for, granting a perpetual injunction to restrain *Lewin Crawcour & Co.* from interfering with the furniture. *Lewin Crawcour & Co.* appealed.

Argument.

Winslow, Q.C., and *Finlay Knight*, for the Appellants:—

In *Ex parte Powell* (1), where an agreement for the hiring of

(1) 1 Ch. D. 501, 505.

furniture had been entered into, very similar in its terms to the present agreement, it was held that the property in the goods did not pass to the hirer until all the instalments had been paid.

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[JAMES, L.J.:—Might not the Appellants have got the whole purchase-money at once by negotiating the promissory notes?]

The notes were to be given up on payment of the instalments. It would have been a fraud on the agreement to negotiate them. The property did not pass to *Robertson*, and there could not, therefore, be a bill of sale by him.

Yate Lee, for the trustee:—

By the agreement the property passed to *Robertson*, and he at the same time mortgaged the furniture to the Appellants. The agreement amounts to a bill of sale by him. This is the real effect of the transaction, and the parties cannot alter it by calling it by a different name. The Court will not allow the provisions of the Act to be evaded in this way. The agreement is nothing but a collateral security for the payment of the promissory notes.

JESSEL, M.R.:— Judgment, Jessel, M.R.

I cannot concur in the ground of the Registrar's decision. Whether it can be supported on other grounds will be a matter for discussion at a future time. The Registrar rested the title of the trustee simply on this, that the agreement was a bill of sale, and that it was void as against the trustee because it was not registered. It appears to me that the agreement was not a bill of sale by *Robertson*, who is the person by whom a bill of sale must have been executed if it is to be hit by the *Bills of Sale Act*. *Robertson* never had any property in the goods. *Crawcour & Co.*, to whom they originally belonged, agreed to let them on hire to *Robertson* at a rent to be paid by instalments, with this further provision, that, until all the instalments had been paid, the property should remain in *Crawcour & Co.*, and that, if any instalment should not be paid when it became due, they should be at liberty to retake possession of their own goods, and the instalments already paid should be forfeited to them. That does not

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make the document a bill of sale executed by *Robertson*, or a license given by him to take possession of personal chattels as security for a debt. It is simply one of the terms of the letting for hire and conditional sale of the goods by *Crawcour & Co.* to him. When the liquidation petition was filed, some instalments of the rent being overdue, *Crawcour & Co.* attempted to take possession of their goods. It appears to me that they were entitled to do so, and that there was no reason for granting the injunction.

James, L.J.

JAMES, L.J.:—

I am of the same opinion.

Brett, L.J.

BRETT, L.J.:—

It is said that this agreement contains a license by *Robertson* to *Crawcour & Co.* to take possession of his goods, and that it therefore amounts to a bill of sale within sect. 7 of the *Bills of Sale Act*. The only way, however, in which *Robertson* could have any interest in the goods or any right to deal with them was by virtue of the agreement itself. It is said that the agreement passed the property in the goods to *Robertson*, and that by it he at the same time mortgaged the goods to *Crawcour & Co.*, and gave them a license to seize them. The sole question therefore is, whether the property in the goods passed to *Robertson*. In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid, and that has not been done yet.

The appeal was allowed, with costs fixed at £20, and the case was referred back to the Registrar to try the question of reputed ownership.

Solicitors for Appellants: *Dixon, Ward, & Co.*
Solicitor for Trustee: *John Hands.*

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June 24, 25.

[1877 R. 261.]

Lands Clauses Act, s. 92—*Part of House—Part of Manufactory.*

The Plaintiff was the owner of a leasehold house in *H. Street*, and of five freehold cottages in *B. Row*, which ran parallel to *H. Street*, the yards at the back of the cottages abutting on the back yard and buildings held with the house in *H. Street*. The Plaintiff used the house in *H. Street* as a dwelling-house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in *B. Row* was turned into a store-house, and was made to communicate with the *H. Street* premises, and was used as a back entrance to them.

A tramway company gave notice to treat for the five cottages in *B. Row* and the yards behind them. The Plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his "manufactory buildings and land" which was comprised in the notice to treat; and for an injunction:—

Held, by *Hall*, V.C., that the whole block of buildings constituted one "manufactory" within the meaning of the 92nd section of the *Lands Clauses Act*, and that the company was bound to take the whole.

Held, by the Court of Appeal (affirming the decision of *Hall*, V.C.), that the whole block constituted one "house" within the meaning of the section:

Held, by *Brett*, L.J., that the whole block also constituted one "manufactory."

The words "house or other building or manufactory" in the 92nd section of the *Lands Clauses Act* refer to three distinct things; and it is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a "house," or a "building," or a "manufactory."

Statement.

W. RICHARDS, the Plaintiff in this action, was a provision merchant and baker in *Swansea*, and occupied buildings of a considerable extent, fronting on the west on *High Street*, and on the east on *Bethesda Row*.

The buildings fronting on *High Street* consisted of a leasehold dwelling-house, shop, and office. Behind them were buildings used by him as a candle manufactory, candle store, bread store, flour store, and provision store, and an open yard. Still further to

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the east were stables, a bakehouse, ovens, a corn-mill, an engine-house and boiler, and then five freehold cottages and small yards, the cottages fronting into *Bethesda Row*. Four of the cottages were used as dwelling-houses, but one, No. 5, and the yard behind it, had been converted by the Plaintiff into a store-house, and was made to communicate with the rest of his business premises; so that the door into *Bethesda Row* was used as a back door for the use of persons going to any part of the Plaintiff's buildings.

In February, 1875, the *Swansea Improvement and Tramways Company*, requiring part of the Plaintiff's premises for the purpose of their undertaking, gave notice under the powers of the Act passed in 1874, with which the *Lands Clauses Act* was incorporated, to take the five cottages and yards behind them.

The statutory powers of the company ceased on the 16th of July, 1877.

After some negotiation, the Plaintiff, on the 7th of December, 1877, gave notice to the Defendants that the land comprised in the notice was a portion of lands and premises occupied and used by him in his business as a merchant and manufacturer, and that he would not sell or part with the said portion or any portion of the said lands and premises unless the company would purchase and take from him the whole of the said lands and premises.

The company having refused to accede to this claim, the Plaintiff brought the present action asking for a declaration that he ought not to be compelled to sell any part of "his manufactory buildings and land" between *High Street* and *Bethesda Row*, by reason of the company's Act having expired, or in the alternative, for a declaration that the Plaintiff ought not to be compelled to sell the part only of "his manufactory buildings and land" which was comprised in the notice to treat; and for an injunction in accordance with the declaration.

The Plaintiff moved for an injunction, which was by consent turned into a motion for judgment. Numerous affidavits were filed and witnesses examined; much of the argument having regard to the question whether the Plaintiff had converted the cottage, No. 5, *Bethesda Row*, with a *bonâ fide* view of using it for his business.

The motion came on for hearing before Vice-Chancellor *Hall* on the 13th of February, 1878.

W. Pearson, Q.C., and *Millar*, for the Plaintiff, referred to the *Lands Clauses Act*, s. 92, and *Sparrow* v. *Oxford, Worcester, &c., Railway Company* (1).

Dickinson, Q.C., *Bradford*, and *Horne Payne*, for the Defendants, cited *Spackman* v. *Great Western Railway Company* (2); *Gardner* v. *Charing Cross Railway Company* (3); *Reddin* v. *Metropolitan Board of Works* (4); *Salter* v. *Metropolitan District Railway Company* (5); *Furniss* v. *Midland Railway Company* (6).

Argument.

HALL, V.C.:—

Judgment, V.-C. H.

I was desirous of leaving this case in a position in which my judgment as to what constituted "the manufactory" might not conclude the question as to the obligation of the company to take the entirety of this property, because it would have been more satisfactory to my mind if there had been some further evidence as to the user of the property. But I do not think it necessary or desirable that the decision of the case should be postponed for the sake of this further evidence, and I will express my opinion at once, and then the matter can go to the Court of Appeal either with or without the admission of additional evidence, as that Court may think fit.

First, then, it has been strenuously argued (and much evidence has been gone into upon the point) that the Plaintiff's claim in this case is not a *bonâ fide* one; that for the purpose of forcing the company to take the whole of what may be called his manufactory, he has created as a part of such manufactory that which was not *bonâ fide* a part of it. And in support of this it is said that until about the month of December, 1874, he was able to go on with his works and carry on his business very well without in any way using the cottage No. 5, in connection with his manufactory; and that it is a just conclusion that he has by a device sought to bring himself within the 92nd section of the *Lands Clauses Consolidation Act*, when he otherwise would not have been within that section. It appears to me that the Defendants have not made out such a case.

(1) 2 D. M. & G. 94.
(2) 1 Jur. (N.S.) 790.
(3) 2 J. & H. 248.
(4) 31 L. J. (Ch.) 660.
(5) Law Rep. 9 Eq. 432
(6) Ibid. 6 Eq. 473.

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The Plaintiff was doubtless negotiating as to the line of this tramway before he altered No. 5; he had at one time wanted it to go by *Thomas Street;* he was afterwards shewn another plan, which was the one now proposed to be adopted, and that he rejected, requiring the Defendants to take the whole of his premises. It has been said that by this he meant the whole of that which was then his manufactory; but even if that was the case, there was no dishonesty or impropriety in a person situated as he was, and pinched for room with regard to his manufactory, saying, "This cottage is mine, part of my property is a manufactory, and until I get a notice to treat I will use this cottage for the purpose of my trade as part of my manufactory, for which I want more accommodation." And although he only made use of it for two months before the notice to treat (if that be true), I consider that the Act of Parliament must be construed according to the state of things existing at the time when the notice to treat was given, and therefore, although in a sense he had been communicated with on the subject, I cannot hold that there was on his part any fraud or want of *bona fides*, or anything which would deprive him of the provisions for his benefit contained in the statute. That is my decision on this part of the case.

The next question is, what was the manufactory? First, as to the cottage No. 5. I consider it clear that, being used for the stowage of sacks, it was used as part of the manufactory, and as such the company must take it. What else, then, was comprised in this manufactory? The Plaintiff apparently began business not actually as a manufacturer, but as a chandler. In the course of time his business increased, and desiring to develop it, and to make articles which he dealt in, he certainly did become a manufacturer as regards an important part of his business; and at the time when this Act of Parliament passed and when the notice to treat was given (putting out of question the use of this cottage for the sacks), a large portion of the whole of the buildings in his occupation was used by him as and constituted a manufactory. He manufactured articles and sold them at the shop, and part of the buildings was used either by himself personally or by those he employed in his shop for residential purposes. Part is now occupied by his manager, dwelling there in order to look after

not merely the shop but also the manufacturing business, and it is thus used more or less in connection with and for the purposes of the manufacturing business. That being so, I think that in a liberal sense, at all events, all these premises may fairly be considered as included in the manufactory. As to the shop, it does not cease to be connected with the place where the actual manufacturing process goes on, or to be, in a fair sense, part of the manufactory, because in it the Plaintiff sells other articles along with those which are manufactured on the premises.

As was said by Lord *Westbury*, who, to use his own expression, was favourable to companies rather than to the individual, "you must construe it in a liberal sense." I, construing it in a liberal sense, hold that all the premises have something to do with and fairly constitute part of the manufactory within the terms of the Act of Parliament. It is said that the provision stores are not necessarily part of the manufactory, but it is not shewn that they are any of them separately used. They are used as stores in connection with the business.

It appears to me, accordingly, that each and every part of the premises in question, the dwelling-house, shop, stables, and everything else not included in the notice to treat which the Plaintiff requires to be taken, comes fairly, reasonably, and properly within the description of a manufactory, or, at all events, of a manufactory or of buildings which the company are bound to take as a whole; although it may possibly be that some portion is a building which they are only obliged to take because it is part of the manufactory. Therefore there must be a declaration that the Plaintiff ought not to be required to sell or convey to the Defendants a part only of the manufactory and building described and referred to in the notice to treat served by the Defendants, or any other part only of the Plaintiff's said manufactory, building, and land, with an injunction to restrain them from entering upon or using such part only, or interfering with the possession or occupation or enjoyment thereof by the Plaintiff, without purchasing the whole of the said manufactory.

From this decision the company appealed. The appeal came on to be heard on the 24th of June, 1878.

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Argument.

Dickinson, Q.C., and *Bradford*, for the Appellants:—

We are content to argue the question without disputing the *bona fides* of the Plaintiff. The Plaintiff carries on no less than three businesses on the premises in his occupation, and it is absurd to call the whole premises one manufactory. The cottage in *Bethesda Row* is quite distinct from the rest of the premises. It is in no sense part of any of the Plaintiff's manufactories; it has only been used as a place to store corn sacks, which is only a colourable user to make it appear part of the manufactory: *Reddin* v. *Metropolitan Board of Works* (1); *Falkner* v. *Somerset and Dorset Railway Company* (2). There are two things mentioned in the 92nd section of the Act: one is a "house or other building," the other is "a manufactory." The Plaintiff in his writ has not required us to take the "house," but only the "manufactory, buildings, and land," of which the cottage in *Bethesda Row* cannot be held to form a part. But even if he had treated the premises as all one "house," he could not succeed; for in no sense is the cottage part of the Plaintiff's house, nor would it pass under a devise of his house.

W. Pearson, Q.C., and *Millar*, for the Plaintiff:—

It is immaterial whether the Plaintiff described his premises in his notice to the company or in the writ as a house or a manufactory. If the case comes within the Act the company are bound to take the whole. The 92nd section refers to three things, not two; namely, a house, another kind of building, and a manufactory. The Plaintiff's premises are certainly one of these three things. The cottage in *Bethesda Row* is part of the curtilage of the Plaintiff's house: *Marson* v. *London, Chatham, and Dover Railway Company* (3); *Salter* v. *Metropolitan District Railway Company* (4). The fact of the Plaintiff manufacturing one or more kinds of goods in a part of his house does not make it the less a house. But the Plaintiff's premises also constitute one manufactory: *Grosvenor* v. *Hampstead Junction Railway Company* (5); *St. Thomas' Hospital* v. *Charing Cross Railway Company* (6); *Steele* v. *Midland Railway*

(1) 10 W. R. 726.
(2) Law Rep. 16 Eq. 458.
(3) Ibid. 6 Eq. 101.
(4) Law Rep. 9 Eq. 432.
(5) 5 W. R. 812.
(6) 1 J. & H. 400.

Company (1); *Giles* v. *London, Chatham, and Dover Railway Company* (2).

Dickinson, in reply.

JAMES, L.J :—

I am of opinion that the decision of the Vice-Chancellor in this case ought to be affirmed. Indeed I should have thought, but for the great length of time which the case occupied in the Court below and here, and the very elaborate way in which it has been argued on a point which seems to me comparatively immaterial, that this really was a clear case. A great deal of the time of the Court below was taken up with that which was really the question the parties came to try, namely, the question of *bona fides*, that is to say, whether the Plaintiff had not in fact *malâ fide* made that thing a part of his house which was not otherwise a part of his house.

But in this Court we have been relieved from that question of *mala fides*, and that being so, it appears to me that we have nothing whatever to do with the times, or the mode, or the circumstances at or under which the property came to exist in the manner in which it did exist at the time the notice was given. It appears to me that it must be tried exactly in the same way as if the site of the whole mass of buildings had been the year before a piece of unoccupied ground, and the Plaintiff had, for the purpose of his residence and of his business, for the purpose of manufacturing that which he wanted to manufacture, built for the first time the mass of building which is now found to exist; and if that had been so built originally, and as one continuous structure, for one common purpose, it appears to me that, as a question of fact, nobody could doubt that the whole thing was one building, or I would rather say, one "house." Of course the word "house" does not mean, it seems to me, necessarily a mere dwelling-house, or a house only used, or exclusively or principally used, for a residence; the word "house" includes a shop, or may consist of a shop. The word "house," beyond all question, as it seems to me, would include a very large inn, or anything of that kind which was built for one

(1) Law Rep. 1 Ch. 275. (2) 1 Dr. & Sm. 406.

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purpose. It has been held to include *St. Thomas' Hospital*, which was a much stronger case than anything we have before us.

Assuming, then, this to have been originally built—and I think it must be treated exactly on that footing—for the purpose to which it was at the date of the notice applied, then it was one building, it was one house. There was internal communication between every part of that building. The door in the *High Street* may be described, and I should describe it myself, as the front door of that house. The door in *Bethesda Row*, in the cottage that was No. 5, may be described, and I should myself describe it, as the back door of that house, serving every purpose whatever for which a back door could be used.

Now, if the whole of this had been used by the Plaintiff for his own residence merely as a private house, there could be no question, as it seems to me, that the whole was one house; and although I have had occasion more than once to consider the matter, I am still of opinion, and will repeat it, that according to my view a house is not the less a house because it is a public-house or an inn; that it is not the less a house because it comprises or is used for the purpose of a shop, or because it comprises or is used for the purpose of a workshop or store-house.

Then, this being a house, all connected with one course of occupation and user, the Plaintiff uses some of the rooms for living in, first in his own person, and afterwards by his servants; he uses other parts of it for selling goods, other parts for making bread, other parts for making candles, other parts for grinding corn, and other parts for stables in which the horses are lodged that he finds it convenient to use. It seems to me, unless we are to start with a proposition that a house ceases to be a house, either partly or partially, because part of it is used for the purpose of business, that this is as much a house as if it had been originally built in the exact shape in which it now is, and every room in the house as they are placed had been used for the purpose of a private residence. It seems to me in that view that the Plaintiff was right in saying, "You must not take part of that without taking the whole."

Now, did he in any way lose this right by the manner in which he shaped his claim originally, or in which he gave what is called

or may be used as a counter-notice, which I believe a man is not obliged to give? Did he in any way lose his right to enforce what he is now asking us to enforce for him? I am of opinion that he did not lose that right. He is not obliged to say exactly in what light he views his property. He is not obliged to say, "I ask you to take it because it is part of a house," or, "I ask you to take it because it is part of a building," or, "I ask you to take it because it is part of a manufactory." He is not obliged to tell his adversary, the company, exactly the ground upon which he is going to bring himself within the Act of Parliament. What he says is, "You are taking part of something, and I am willing and ready to sell you the whole of that something." He might describe that in any way he likes. He might describe it by metes and bounds, instead of calling it, as he did here, "land occupied and used by him in his business of a merchant and manufacturer." He might have sent the company a plan of the whole, and said, "That is a plan of the whole, and I ask you to take the whole." At all events, if there was any doubt as to what it was he was requiring them to take, the company have made him describe it accurately in the amendment of his writ. Therefore it seems to me that the Plaintiff was not under any difficulty arising from the notice, and that being so, I come to the conclusion that it was part of one continuous building used as one continuous building, and I am of opinion that the Plaintiff was right, and that the order of the Vice-Chancellor must be affirmed.

The Vice-Chancellor put it upon the ground that it was part of a manufactory. I do not think it necessary to go into that part of the case, as to whether it is part of a manufactory or not. Although I confess I should have had some doubt about it, I certainly am not prepared to express a dissent from the conclusion to which the Vice-Chancellor came, having regard to the extent to which manufacture is carried on here. And although there are different manufactures in one sense, they are connected with one business, the business of selling afterwards. I am not, therefore, prepared to express my dissent from the ground upon which the Vice-Chancellor based his judgment. However, taking, as I do, a very strong and clear view on the other part of the case, I do not think it necessary to go any further into that part of it. I am

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of opinion, therefore, that the appeal should be dismissed with costs.

BRETT, L.J.:—

I am also of opinion that this judgment should be affirmed, and I am of opinion that it should be affirmed on the ground that this was one house, a part of which was taken, and also that it was one manufactory, part of which was taken; and that if it was only one house it was also a manufactory; but even if it is to be taken to have consisted of more than one house, it was nevertheless one manufactory. It seems to me that the case has raised a question on the construction of the Act of Parliament, and also a question of the treatment of facts. With regard to the construction of the Act of Parliament, in my opinion there are three different things treated of in that section of the Act. That which is treated of is premises, and there are three kinds of premises which are described. The first kind of premises described is a house; and that word has been held to mean not merely that which is a house in the ordinary sense, but a house both in the ordinary and legal sense; that is to say, it must be a house in the ordinary sense, but it may include more than a house in the ordinary sense, namely, that which is also a house in the legal sense, that is, the house and the curtilage and garden, and all that is necessary to the enjoyment of the house. The second thing which is described in that section seems to me that which is not in the ordinary sense a house, but a building which is in the nature of a house, although in ordinary language it would not be called a house. The third thing which is mentioned in the section is a manufactory, which may be a house, or may be a building, but which may be something more; that is to say, it may be more than one house, or more than one building, or it may consist of neither house nor building, but only of land used for a purpose of manufacturing. No part of that section is to diminish any other part. Each thing described is different from the others, and it is not circumscribed by the description of any of the others.

Now that being so, the question is raised whether the premises which were to be dealt with here were one house or one building, or whether they were one manufactory. I cannot help feeling

that the period of time to which alone you must look is the moment before the notice to treat is given; and what you have to consider in all these cases is the state or nature of the premises to be dealt with at that moment, and that it does not signify when or how that state of the premises was brought about.

Now to consider, first, whether these premises were one house. It seems to me that the question under this Act of Parliament as to whether the premises were a house or not is partly structural and partly one of user. You must have the premises so structurally made or placed that they may be one house, that is, one house in that large sense to which I have adverted; and secondly, you must have them enjoyed as one house, or held as one house. Now here, looking at the building, a model of which has been shewn us, by reason of the internal communication and by reason of the circumscribed ambit, it seems to me that structurally it is capable of being considered one house. You could have internal communication with every part, and they are so circumscribed within one ambit that you may say they are within one curtilage.

But then arises the question whether they were enjoyed as one house. Now, putting aside the question of manufactory, taking it as if they were used for business, how were they used? There is but one occupier of the premises. The premises are used for the purpose of business. The way in which they were used for the purpose of business is that the business, whatever it is, is carried on under one management; it is carried on by servants and workmen, who are treated as one body; and although the articles dealt in are different, yet the whole is carried on by one person as one business. If that be true, the premises are structurally capable of being one house; they are occupied for carrying on a business, as I have said, under one management. I cannot think it makes it the less a house because it is used not as a mere residence but as a business house. If so, I think the company brought themselves within the statute by taking No. 5 and the yard behind it, or either of them, and that they were bound to take the whole house, or to give up what they had taken.

Then I am also of opinion that this is one manufactory; and I think so whether it is one house, or whether you are to consider it as more than one house. I cannot think that the fact of its being

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one house makes it less of a manufactory if it is used for the purpose of a manufacture. I do not think that this is the meaning of the Act of Parliament. It may be a house and a manufactory; it may be one manufactory although it is not one house. The question then is, first, whether it is a manufactory; and secondly, whether it is one manufactory.

Now, looking at the mode in which these premises are used, I think it is impossible for any one to say that such premises can be required for selling purposes only. The extent of the premises and the mode in which the different parts of them are used make it clear to me that it is not reasonable to say that the main use of these premises was for selling purposes. I consider that the main use of these premises was for manufacturing purposes; and if that be so, although selling was carried on on the premises, still I think that as the main use was for manufacturing purposes, it is proper to call them manufacturing premises. At all events, as a question of fact, the Vice-Chancellor, the Judge who tried this case in the first instance, came to the conclusion, as a matter of fact, that these premises were manufacturing premises; and upon such a question of fact I apprehend this Court, as a Court of Error, ought not to overrule the decision unless we can satisfy ourselves that it was wrong. And, so far from being satisfied that it was wrong, I am myself strongly of opinion that it was right as matter of fact.

Then comes the question whether it was one manufactory. Here again we have the fact that the business is carried on by one person under one management by servants who are treated as one body, and therefore, unless there is something to prevent these premises from being one manufactory, it seems to me that they must be treated as one manufactory. Now, what is relied upon is this: It is said that different processes of different manufacture, producing different results, are carried on. That is true, but it seems to me that, where the whole business is carried on by one person under one body of servants and with one capital, the mere fact of different articles being manufactured on the premises produced by different processes does not make those manufacturing premises two sets of manufacturing premises, but leaves them one.

Therefore, I think that whether you consider this as a house or

whether you consider it as a manufactory—it is both—but in either case it is one and single. It is one set of premises, and used for one purpose, and therefore it is one house and it is also one manufactory. In either case, I think that either No. 5 or the yard brought the company within the statute. I think, therefore, that this judgment ought to be affirmed.

COTTON, L.J.:—

The question we have to consider is this, whether or no the Defendants, by the notice they gave, were proposing to take a part or fraction of one of those units which are protected by the 92nd section. Now there are three words used—"part only of any house or other building or manufactory." In my opinion those must be considered as three things, that is to say, there may be a manufactory which is not a building, there may be a building which could not properly be described as a house, and a house includes more than mere building, and I am of opinion that although a house or other building is read together in this sense, that a house involves the notion of building, yet that a manufactory does not involve necessarily the idea of building. Manufactory is put in there, in my opinion, to provide for the case of a manufacture being carried on on premises where there was no house or building, but yet it is a manufactory in the sense of its being premises appropriate for the carrying on of what may be called a manufacture, and is a manufactory in that sense. Then "building" and "house" I also look upon as distinct in this way, that there may be a building which could not be said either in the legal sense or in the ordinary sense to be a house, and that therefore that word was added as something different from that in order to include something not necessarily included in this word "house."

I do not intend to give an opinion on the question whether or no what the Defendants propose to take by their notice to treat was part of a manufactory. I do not consider it necessary to give an opinion on that question, because, in my opinion, what they were proposing to take was part of a house. We are not construing this section now for the first time. We have had plenty of authority as to what the meaning of "house" is, and although I do not at all think that we ought to construe this liberally to

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favour the landowner, yet we ought to construe it reasonably and fairly, having regard, of course, to previous decisions, and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners, to persons whose property was taken away from them against their will, so that no person should be required to sell a fraction only of that which ought to be regarded as a unit, when he might be very materially prejudiced by having left on his hands certain fractions only of that unit, not capable of being used efficiently when one fraction had been taken away from it. What we have to do is to construe the section fairly, and see whether or no in the present case that which the company are proposing to take is or is not a part of one of these units described in this Act of Parliament. I should mention here that one must not really be nice to see whether or no proper notices have been in terms given; it is quite sufficient, in my opinion, if, when the company have proposed to take a bit of land, the landowner has given them notice that he is able and willing to sell, and desires them to take the whole of a certain defined property. Whether or no he describes it inaccurately as a manufactory when he ought to have described it as a house, or as a building when it ought to be described as a house, or *vice versâ*, is, in my opinion, immaterial. I mention that, because in the present case the argument at first was simply directed to the question of whether or no this was a manufactory, and the notice given by the landowner, the Plaintiff, no doubt pointed specifically to a manufactory and not to what, in my opinion, was the proper description of this, a house.

With regard to the word "house," it is impossible to say it is to be confined to a building used wholly, or almost wholly, for residential purposes. In fact it was conceded by Mr. *Dickinson*, and it could not be well disputed, that "house" would include business premises, and, in my opinion, that is perfectly correct, although possibly it might be said that "house" points primarily to a residence. Yet it is impossible, especially after the decided cases, to say that a "house" is confined to that of which the primary object is residential. I refer to a case which was so often quoted in the argument, that of *St. Thomas' Hospital*. No doubt persons did reside there, and the persons, while they were

being treated there for diseases or for accidents under which they were suffering, did some of them live there. Yet it is impossible to say that it was a residential house, but it was held to be a house within the fair meaning of this Act of Parliament. That the word "house" is not to be confined to something used for residential purposes is very apparent from what was said by Lord *Hatherley*, when Vice-Chancellor *Wood*, that you could not possibly take the theatre of the hospital and then say you were not taking part of the house. If you were to confine that which is part of the house within the meaning of this section to that which, although not structurally part of the building was required for the residential purpose, it is impossible to say that the theatre of the hospital could be in any way connected with residential purposes, although persons did reside in the hospital, or with the residence of the persons who were so treated. If we arrive at this, that a hospital is, within the fair meaning of the Act of Parliament, a "house" within this section, then everthing which is an adjunct to the hospital, for the purpose for which a house *quà* hospital is used is a part of the house.

Now, I think that is not unimportant in the present case, for this reason. What we have to consider is, whether or no these premises are one house. I quite agree with what Lord Justice *Brett* has said, that the word includes what in ordinary parlance is considered a house, and includes everything which in law would pass by the conveyance of a house or messuage. Now, look at this, and see whether it does not come within the ordinary sense of a house, certainly within the legal sense of a house. Here we have a large block of building; it is connected throughout by internal communications, that is to say, there are certain yards included within the ambit of these premises; there are doors opening into these yards, by which you can communicate from the front to the back of these premises without going into any public thoroughfare. Then we have what was originally a separate cottage in *Bethesda Row*, but there has been an internal communication made through that house into *Bethesda Row*, and that is used as a means of access, and may be called a back door to the rest of the premises for bringing in and taking out sacks full and empty, and for persons to go in and come out. Then there

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is another communication on the other side towards *Bethesda Street*, and there is on that side of the premises a yard, which is used, for purposes connected with the business carried on in the adjoining buildings. The question, to my mind, is not that of the particular use to which these premises are being applied. I entirely disregard the question as to whether or no the particular use is such that they are a "manufactory" in consequence of that use. Here we have a building with continuity, if not unity, of structure; we have it in common occupation, that is to say, all in the occupation of the Plaintiff by himself and his servants in carrying on the business, of which we may say the front is the property in *High Street*, where there is the shop, the place where he sells what he makes and buys for the purpose of selling. If you disregard entirely the question of manufactory, I think few persons would hesitate to say that the whole of the block is a house having entrances in *High Street* and in *Bethesda Row*. Moreover, that will be part of a house within the meaning of this Act of Parliament which would pass by a conveyance of the house, although not part of the structure at all, being part of the curtilage or land, or yard, connected with the house in such a way that it would pass within the description of a house.

Then, does this cease, either in legal language or in ordinary language, to be the one unit, a house, because different parts of it are used for the purpose of manufacture, or for the purpose of different manufactures? In my opinion it does not. Taking what I will assume to be, independently of its user, a house, whether or no the whole of the user is for the purpose of the owner of the house, for the purpose of the business carried on by him in his house, can that possibly prevent these premises from still being a house within the meaning of this section? In my opinion it cannot.

Then we come to this, that by the notice which the Defendants, the *Tramway Company*, have given, they propose to take that part of this block, which is in fact the back door, that is to say, the old cottage No. 5, which has by the alteration in structure been made capable of being part of the house, and which is actually used as a part of the house. They have also taken what, in my opinion, is part of the house in legal language, if it would not be in ordinary language, although I do not at all say it would not

be, namely, that yard which lies on one side of these premises. That being so, I am of opinion that they have taken part of that unit, the house, and under the 92nd section they cannot take that alone if the owner desires them to take the entirety, and is able and willing to convey to them the entirety, which the Plaintiff professes to be.

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In my opinion, therefore, the decision was right, and in this case the Plaintiff is entitled to protect himself from the act of the Defendants, and to prevent them from taking part without taking the entirety of the block, which he has sufficiently described by his notice and by his writ.

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Solicitors for Plaintiff: *Bell, Brodrick, & Gray*, agents for *Smith, Lewis, & Jones, Swansea.*

Solicitor for Defendants: *Walter Webb.*

DOUCET *v.* GEOGHEGAN.

C. A. 1877 V.-C. M. *Feb.* 5, 6, 7, 14, 19, 20. C. A. 1878 *June* 28.

[1875 D. 15a.]

Domicil—Change of Original Domicil—Permanence of Residence—Declarations of Intention.

The testator in the suit was a Frenchman, but had lived twenty-seven years in *England*, during the greater part of which time he was a partner in an English house of business, paying occasional visits to *France*. He married successively, in English churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in *England* as Protestants. He made his will in the English form, and left his property in a manner inconsistent with French law. Upon an action to establish a French domicil, numerous witnesses deposed that he had made various parol declarations that he intended to return to *France* when he made his fortune. It was also proved that he always refused to be naturalized in *England*, and would not take a lease of more than three years of his house:—

Held (affirming the decision of *Malins*, V.C.), that the acts of the testator manifested an intention to acquire an English domicil; and that his declarations of intention to return to *France* when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages.

THIS action was brought by *Adèle Doucet*, the widow of the testator, *François Eugène Doucet*, against *William Joseph Geoghegan*,

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the executor of his will, and *Michael John Geoghegan*, the testamentary guardian. The testator was by birth a Frenchman, but lived and carried on business for many years before his death in *England*. His will was made in *England*, and was dated the 25th of November, 1872, and thereby he appointed *William Joseph Geoghegan* and *Frederick Allen* executors and trustees; and after bequeathing certain pecuniary and specific legacies, he gave and bequeathed to his trustees all his capital invested in the business theretofore carried on by him, and all his share and interest in the same business, and all the rest of his property, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust as to one moiety for his children as therein mentioned, and as to the other moiety upon trust to pay the annual produce thereof to the Plaintiff during her widowhood, and after her decease or remarriage, which should first happen, upon trust for his children in the same manner as thereinbefore directed with respect to the other moiety. And in the event of there being no child who should attain a vested interest, in trust for the Plaintiff for life, and after her death upon trust for his sister *Clemence*, the wife of *Auguste Duclerc;* and the will contained powers of advancement and maintenance for the benefit of the children during minority. And after expressing a desire that his children should be brought up in the Roman Catholic faith, he with that object nominated and appointed the above-named Defendant, *Michael John Geoghegan*, a Roman Catholic, guardian of his children during minority, and requested and empowered him to take upon himself all the necessary duties of the guardianship for the purpose aforesaid. The testator left the Plaintiff, his widow, and three children by her, him surviving; all of whom were infants. *Frederick Allen* renounced and disclaimed the executorship and trusteeship of the will, and the same was proved on the 8th day of January, 1875, by the Defendant *W. J. Geoghegan* alone.

The Plaintiff contended that *F. E. Doucet* was a domiciled Frenchman, and that the validity of the will, the administration of his estate, the rights of the Plaintiff and her children in that estate, and the right of the Plaintiff to the guardianship of her children, were respectively governed by the law of *France;* by which the Plaintiff, as the widow of a Frenchman, was entitled

to one moiety of the real and personal estate of which he died possessed unfettered by any trust, and his children were in like manner entitled to the other moiety. By the same law the Plaintiff as such widow was entitled to the guardianship and education and bringing up of her children by her deceased husband, free from the control of the Defendants, or either of them, or of any third person. There were several other particulars in which the will was inconsistent with the law of *France*.

The Plaintiff claimed that it might be declared that the estate of *F. E. Doucet* ought to be administered according to the law of *France;* and that his will was null and void so far as it was in any particular in contravention to the law of *France* relating to the wills of Frenchmen.

The facts proved in the case, and which were common to both sides, were as follows:—The testator was by birth a Frenchman, and was born in 1820. He resided in *France* till he was twenty-seven years of age. His father was a shirt-maker in *Paris*, and he was brought up with a knowledge of that business. For seven years he was in the French army. In the year 1847 he came to *England* and became assistant in a hosier's shop. In 1851 he entered into partnership in the hosiery business with a Mr. *Barlow*, the partnership deed being drawn in the French language, and with the sanction of his father. On the 17th of September, 1852, he married his first wife, an English lady, who died on the 3rd of October, 1853. She was of the Protestant religion, and the marriage took place in an English church, according to the Protestant form, and the testator, who was brought up in the Catholic religion, always allowed her, without any interference on his part, to practise her own religion. On the 1st of September, 1853, just before the death of his first wife, he entered into partnership with the Defendant, *W. J. Geoghegan*, as hosiers, and the business was carried on in *Regent Street*, under the style of "*Geoghegan & Doucet.*" At the expiration of ten years, that is, in 1863, this partnership was renewed for ten years longer.

On the 5th of January, 1856, the testator married, in an English church, his second wife, the Plaintiff, who was also a Protestant, her father being French and her mother English. The testator did not on the occasion of this or of his former marriage conform

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to the formalities which are required by the French law for the legalization of marriages of Frenchmen in a foreign country. During the whole period of the marriage the Plaintiff continued in the Protestant religion, and was a regular attendant at the Established church.

There was no child of either marriage until 1861, when a son was born, and upon that occasion the Plaintiff, at the urgent request of the testator, and in order to please his father and mother, allowed the son to be baptized in the Catholic form, but from that time to the death of the testator the son was brought up as a Protestant, and regularly attended a Protestant church with his mother. There were two other children born subsequently, both being girls, who were baptized in the Protestant form, and were brought up in the Protestant religion. No objection was raised by the testator during his life to any of his children being educated as Protestants, and he himself only attended a Catholic church upon one occasion during the period of his residence in *England*.

In the year 1869 the house of *Geoghegan & Doucet* established a branch business in *Paris*, which lasted till the year 1874.

In the year 1870, the partnership between the testator and *William Geoghegan* having then three years to run, was renewed for another period of ten years. The testator's share of the profits amounted, during the latter years of the partnership, to about £1500 per annum. Of this sum he drew out about half for his personal expenses, and the remainder was allowed to remain as part of the capital of the business, so that the capital of the testator at the time of his death amounted to nearly £8000. When the testator first married the Plaintiff, they lived over the business premises in *Regent Street*, they afterwards removed into lodgings in *Bentinck Street*, where they resided between eleven and twelve years, and then the testator took a lease for three years of a house in *Albion Road, St. John's Wood*, in which he lived until his death, which took place on the 17th of June, 1874.

The evidence of the witnesses, who were examined in Court, in support of the Plaintiff's case, and in favour of a French domicil, was to the following effect:—The Plaintiff, Madame *Doucet*, deposed that the testator always and continuously expressed an intention of

returning to live in *France* when he had made sufficient money to enable him to do so. He refused to purchase a house or to take a longer lease than three years, because it would interfere with his returning to *France*. He always desired to improve the branch business in *Paris*, which would enable him to live there, and to establish his son in that business. After being taken ill, he was still more anxious to return to *France*, because he thought his native air would improve his health. He said in confidence that he should not tell the *Geoghegans* that he intended returning to *France*. He went to *Paris* two or three times a year, and remained there two, three, and four weeks at a time. The Plaintiff usually went with him once every year. He was always fond of *France*, and used to point out to her the advantages of living there. He refused to be naturalized in *England*, and often spoke of the advantage he derived in being a Frenchman, as it exempted him from serving on juries. Before her marriage the testator promised her in the presence of her father and mother that all her children should be brought up in the Protestant religion, and it was in consideration of that promise that she married him. The eldest son was baptized by a Catholic priest to please the testator's father and mother, and at his urgent request, but from that time he never interfered with the religion of the children, and all three were brought up as Protestants, and the elder children went to church with her. In 1857 the testator had made a will by which he gave her everything, but in 1872 she urged him to make a new will. He said in answer to this that it was unnecessary, since the French law provided for the distribution of property. He afterwards altered his mind, and promised to make another will when he next went to *France*. The present will she had never heard of till after his death.

Several other witnesses deposed to the fact that the testator had frequently in the strongest terms expressed his intention of returning to *France* and permanently settling there, when he had made sufficient money to enable him to do so, and that these expressions of his intentions continued up to the last day of his life.

Some of these witnesses said that he had expressed a wish to take a house on the River *Marne*, near the place of his birth, where he could enjoy his favourite amusements of boating, fishing,

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and sketching, and that the testator was proud of his country and of being a Frenchman, and was prepared during the war between *France* and *Germany* to join the army of *France* if called upon.

On behalf of the defence, and in favour of an English domicil, one witness said the testator many years ago expressed his intention of returning to live in *France* after he had "spoiled the Egyptians," but since then he had said nothing either way about his return. The Defendant *W. J. Geoghegan*, the partner of the testator, said his impression was that M. *Doucet* in the first years of his residence in *England* had a vague idea of returning to *France*, but in the later years he never referred to leaving *England*, but said *England* was his home, and he refused to accept the witness's proposal that he should remain half the year in *Paris* for the sake of improving the *Paris* business, because he said that since his father and mother's death he had no interest in living in France, and that he should not like to return and no longer find his father's house open to him. He was always glad to get home after two or three weeks' stay in *Paris*, and seemed much more settled after he took his house in *St. John's Wood*, which he was particularly fond of, he used to call his paradise, and had laid out about £800 in the repairs of that house.

The evidence of the mother of the testator's first wife, and of *M. J. Geoghegan*, the solicitor who prepared his will, was also strongly against the testator having had any intention of returning to *France*.

The action came on for hearing before Vice-Chancellor *Malins* on the 5th of February, 1877.

Argument. ——

J. Pearson, Q.C., Dr. *Tristram*, and *Cottrell*, for the Plaintiff:—

The domicil of the testator was originally French, and a person always retains his domicil of origin until he does something to shew that he intends to throw off that domicil and acquire a new one. To decide whether a man has changed his domicil, you must take facts as well as intention. You may from some circumstances infer an intention to change the domicil of origin, but you may rebut any such inference by shewing it was not the intention of the person to acquire a domicil in the country he is inhabiting: as for instance, if a man is here because he has

any particular occupation in the country, or is here for the purpose of trade, without any intention of making this his permanent abode. On the subject of intention there is the case of *Douglas* v. *Douglas* (1), in which Vice-Chancellor *Wickens* explained his view of the law in this way: "What, therefore, has to be here considered is whether the testator ever actually declared a final and deliberate intention of settling in *England*, or whether his conduct and declarations led to the belief that he would have declared such an intention if the necessity of making his election between the countries had arisen." The evidence in that case was stronger than in this case to shew that the testator, whose domicil of origin was Scotch, had changed his domicil, but the Vice-Chancellor said that no intention had been expressed to that effect, and decided in favour of a Scotch domicil. Here there is no evidence to shew that the testator intended to resign his French domicil and to acquire a domicil in *England*. And the rule, as expressed in *Price* v. *Dewhurst* (2), is that the law of the place of domicil is to regulate the decision of what was the last will and what are the rights under it.

Before a new domicil can be acquired there must be some act to shew that the old domicil was relinquished; that was expressed in *Udny* v. *Udny* (3). It requires a very strong case to make a man lose his domicil of origin. Change of residence, however long and continued, will not be sufficient to effect a change of domicil as regulating the testamentary acts of an individual without an express intention to take a new domicil. The case of *Moorhouse* v. *Lord* (4) lays down that rule very forcibly. In order to lose a domicil of origin and to acquire a new domicil a man must intend *quatenus in illo exuere patriam*. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life, but he must intend to cease to be a Frenchman, and to become an Englishman. This was followed in *King* v. *Foxwell* (5), where the Master of the Rolls said that a permanent domicil could not be decided by mere length of time, but it involved the intention of

(1) Law Rep. 12 Eq. 617, 645.
(2) 4 My. & Cr. 76, 84.
(3) Law Rep. 1 H. L., Sc. 441.
(4) 10 H. L. C. 272.
(5) 3 Ch. D. 518.

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Argument.

the person. Even the purchase of a place of residence in *England* would not be conclusive: *Hodgson* v. *De Beauchesne* (1).

It was laid down in *Jopp* v. *Wood* (2), affirmed on appeal (3), that a domicil can only be changed *animo et facto*, and residence alone, although decisive as to the *factum*, is an equivocal act as to the *animus*. The acquisition of a new domicil involves the abandonment of the previous domicil, and to effect the change the *animus* of abandonment must be shewn. A man going abroad for the purpose of trade and to obtain a fortune, does not by a residence abroad intend to acquire a foreign domicil. You cannot take away a man's right to his domicil of origin unless there is an express intention to part with it. In this case there is the strongest evidence of an intention to return to *France* and live there permanently. We are not to assume, because a man marries an Englishwoman when he comes here for the purpose of trade, that on that account he intends to live for the rest of his life in *England;* nor can we say that because he has children by his wife, that therefore he meant to be an Englishman. This lady, however, was not English, for her father was a Frenchman and she was born in *Italy*.

From the evidence before the Court there is but one intention shewn, viz., that he intended to return and live in *France* when he had made money enough to enable him to do so. He came here for trading purposes. He never took a step in *England* to fix himself to the soil. He would only take a short lease of his house, in order that it should not interfere with his return to his native country.

We have also eighteen witnesses who have been examined, all of whom state positively that the testator frequently and upon all occasions spoke of his intention to return and live in *France*, and these expressions were continued down to the day of his death. And against this long list of witnesses there are only two on the other side, namely, the two *Geoghegans*, who give evidence in contradiction to ours. The provisions of the will are very unjust towards the Plaintiff, and are inconsistent with the previous acts and promises of the testator. It is almost impossible to believe that it expresses his real intentions.

(1) 12 Moo. P. C. 285. (2) 34 Beav. 88. (3) 4 D. J. & S. 616.

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Argument.

Glasse, Q.C., and *F. G. Bagshawe*, for *William J. Geoghegan*:—

The cases cited in support of a French domicil are very different in their circumstances from the present case. To shew that a man intends to change his domicil, one fact is worth a dozen expressions of intention such as we have from the witnesses on behalf of the Plaintiff, who only repeat the observations of a man who spoke what he might for the moment be thinking of. But what are the facts? The testator had married two wives in *England*, both English and both Protestants; he had children brought up in English habits, and also educated in the Protestant religion. He had a lucrative business: he had entered into partnership on three occasions with *William Geoghegan*, and each time for ten years. He had settled himself in a house in which he was thoroughly happy and contented, and on which he had expended a large sum of money. In contradiction of the Plaintiff's evidence as to expressions of intention, we have the evidence of the two *Geoghegans* that he meant to make *England* his home.

As to authorities, the case of *Drevon* v. *Drevon* (1) is stronger than any other, and is singularly like the present case in all its circumstances. Then in *Haldane* v. *Eckford* (2) it was laid down that, in order to effect a change of domicil, it is not necessary that a man should do all in his power to divest himself of his original nationality, *exuere patriam*, it being sufficient that there should be a change of residence of a permanent character voluntarily assumed; and though a residence may be originally temporary, so soon as a change of purpose or *animus manendi* can be inferred, the fact of domicil is established.

The facts in *Stevenson* v. *Masson* (3) were not nearly as strong in favour of an English domicil as in this case, but the domicil in this country was established; and in *Brunel* v. *Brunel* (4) it was held that a French subject, by establishing himself in business in this country, marrying, and continuing to reside here for more than thirty years, making only occasional visits to *France*, had established an English domicil, and there the testator had refused to take out letters of naturalization in this country, on the ground

(1) 34 L. J. (Ch.) 129.
(2) Law Rep. 8 Eq. 631.
(3) Law Rep. 17 Eq. 78.
(4) Ibid. 12 Eq. 298.

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that he might return to *France*, and would not give up his *status* as a French citizen.

Argument.

Higgins, Q.C., and *Pace*, for *Michael J. Geoghegan*, supported the same view. They referred to *Hamilton* v. *Dallas* (1); *Andrews* v. *Salt* (2); *Aitchison* v. *Dixon* (3); *Round* on Domicil, where the leading cases are collected.

J. Pearson, in reply.

Judgment, V.-C. M.

MALINS, V.C.:—

This case is one which involves consequences of the utmost importance and public interest. It has now occupied the Court for five days in argument and in hearing evidence. The great length of time it has already occupied, and the smallness of the stake at issue, make it desirable that the case should be terminated without further delay, and I therefore intend to deliver judgment at once. I may observe that while the arguments have been going on I have again and again considered all the evidence and read all the authorities which have been cited, consequently there would be no advantage gained by delaying my judgment.

The object of the suit is to have it declared that the testator, *François Eugène Doucet*, was at the time of making his will a domiciled Frenchman. That he had resided for many years in this country is the common case on both sides; but it is said he never threw off his intention of remaining a Frenchman, and had always an *animus revertendi*, and therefore that the estate must be administered according to the law of *France*. The testator's widow is the Plaintiff, and she claims that the will ought to be administered according to the law of *France*, and that it may be declared void so far as it is in contravention of that.

Now in order to determine the question of domicil of the testator, the circumstances connected with his coming to this country and remaining here must be considered. [His Lordship then referred to and commented at some length on the evidence adduced on both sides, and continued:—]

I think it may be taken upon this evidence that the testator did

(1) 1 Ch. D. 257. (2) Law Rep. 8 Ch. 622.
(3) Law Rep. 10 Eq. 589.

say to many persons throughout his life that it was his desire and intention to return to *France*. On that subject it may be said that it is the constant habit of some persons to say they will do certain things when they have money enough for the purpose. No doubt he made these statements repeatedly, but is there enough to counteract the fact of his being settled in *England*, where his business was, and where he hoped at a future time to settle his son in business? These were strong reasons for his remaining here. He was evidently an impulsive man, and might have said he would return to *France*, when, in fact, he had no intention of ever doing so.

Under these circumstances I shall apply the rule which was laid down in *Hodgson* v. *De Beauchesne* (1), where it was said that mere residence for a length of time was not sufficient to constitute a domicil, but it involved the intention of the person to remain.

Now, if I take all these witnesses together to prove his intention to return, I must also look at the evidence on the other side, which was given by two persons who were the most likely to know his real intentions; these persons were the two *Geoghegans*. Mr. *William Geoghegan* was his partner, in whom he placed unbounded confidence, and whom he appointed his executor. He was a person who was likely to know what his real intentions were, and his evidence is, to my mind, conclusive. I assume that up to 1866, when his mother was alive, and even up to the time when the family residence was disposed of, there was a strong intention on his part to return to *France*. But what do the Defendants say? [His Lordship commented upon their evidence].

Now, therefore, if I take the evidence on both sides, I have the last and most emphatic declaration of M. *Doucet* that *England* was his home, and here he was content to remain. Therefore I come to the conclusion that he had finally abandoned the intention of returning to *France*, and made up his mind that this country was to be the country of his adoption, and that it was his intention, for the purpose of disposing of his property, to become an Englishman.

With regard to the cases which have been cited, the case which

(1) 12 Moo. P. C. 285.

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has the closest application to this is *Drevon* v. *Drevon* (1). Some of the facts there are stronger in favour of a French domicil than in the present case, and some of the facts are stronger in favour of an English domicil than here, but the observations of Vice-Chancellor *Kindersley* (2) are very decisive: "There is in this case, as there generally is in cases on questions of domicil, evidence on both sides with regard to expressions, intention and declarations of intention on the part of the testator, evidence of his saying he meant some day or other to go back to *France*, and, on the other hand, evidence of his saying he meant to remain all his life in *England*, and so on. I think there is no doubt that, upon the cases, the Courts naturally are disposed to give less weight to that sort of declaration than to the acts of the testator."

Vice-Chancellor *Kindersley* then reviewed all the facts and evidence in that case, and came to the conclusion that the domicil of the testator was English, notwithstanding the evidence of frequent declarations made by him that he intended, some time or other, to return to *France*. The circumstances in that case were very similar to those in this case, and upon the whole I agree entirely with the decision of the Vice-Chancellor.

Then, with regard to the other cases, there are two or three decided by Vice-Chancellor *Bacon;* the first is *Brunel* v. *Brunel* (3). There there was a residence of thirty years; here there are twenty-seven years. There the testator stated distinctly that he would not give up or surrender his citizenship of *Paris;* that he was a Frenchman and might return to reside in *France*, and that he consequently declined to become a naturalized British subject. But nevertheless the Vice-Chancellor decided in favour of an English domicil, on the ground of his permanent residence in this country for so many years.

The circumstances in the case of *Douglas* v. *Douglas* (4) were so different from these that I do not feel myself pressed in any manner by it. As to *Udny* v. *Udny* (5), it appears to me that all I am now deciding is in strict accordance with that case.

Jopp v. *Wood* (6) is a case relating to an Indian domicil, which

(1) 34 L. J. (Ch.) 129.
(2) Ibid. 131.
(3) Law Rep. 12 Eq. 298.
(4) Law Rep. 12 Eq. 617, 645.
(5) Ibid. 1 H. L., Sc. 441.
(6) 4 D. J. & S. 616.

is quite different from all other cases of domicil, because it is well known that every one who goes to *India* does so for the express purpose of making money and returning to this country as soon as possible. In *Haldane* v. *Eckford* (1) it was held to be sufficient that the testator had a residence of a permanent character voluntarily assumed, and that a residence originally temporary and intended for a limited period might afterwards become general and unlimited, and as soon as the *animus manendi* could be inferred, the fact of domicil was established.

Stevenson v. *Masson* (2) is another case in which an English domicil was established in the case of a man who had given up a Canadian domicil and had come over to this country, and had purchased the lease of a house in *St. John's Wood* in the year 1868, where he lived till the time of his death, in 1871; and in *King* v. *Foxwell* (3) it was held that in order to change the domicil of origin it was sufficient for a man voluntarily to fix his sole or principal residence in a foreign country with the intention of residing there for a period not limited as to time.

Now, therefore, whether I look at the evidence or at the whole history of the testator's life, I think that for the purpose of disposing of his property he must be considered as domiciled in this country. It would be monstrous that a man who had made his fortune here, and lived here for so many years, should be so helpless as to be obliged to allow his property to be disposed of according to the French law. The suit, therefore, naturally fails; and as Mr. *Glasse* does not press for costs, all I have to do is to direct that the estate of the testator is to be administered according to the law of *England*.

As to costs, the Plaintiff will not have any costs up to the hearing; but as this is an administration suit, the rest of the costs will be costs in the cause. In conclusion, I must express my regret that Mr. *Michael Geoghegan* should ever have made such a will as this; at the same time I think, considering the small amount of property involved, this suit ought never to have been instituted.

From this decision the Plaintiff appealed. The appeal was heard on the 28th of June, 1878. C. A.

(1) Law Rep. 8 Eq. 631. (2) Law Rep. 17 Eq. 78. (3) 3 Ch. D. 518.

C. A. 1878 DOUCET v. GEOGHEGAN.

J. Pearson, Q.C., Dr. *Tristram*, and *Cottrell*, for the Appellant, cited *King* v. *Foxwell* (1); *Udny* v. *Udny* (2); *Haldane* v. *Eckford* (3); *Aitcheson* v. *Dixon* (4); *Moorhouse* v. *Lord* (5); *Jopp* v. *Wood* (6).

Glasse, Q.C., and *F. G. Bagshawe*, for the executor, and *Higgins*, Q.C., and *Pace*, for *M. J. Geoghegan*, were not called on.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R. :—

The principal question in this case is, what was the domicil of the testator? For one thing is quite clear, that if his domicil was not English his will cannot take effect. I will state shortly the undisputed facts of the case. The testator, who was born in *France*, when young, in the year 1844, came to *England*, and in fact resided in *England* till his death. He was first a shopman in the hosiery business till 1851, and then went into partnership with a person named *Barlow*. The partnership articles were executed in *Paris*, and the partnership was regulated by French law, but he returned to *England* and carried on business in partnership with *Barlow* in *London*, and married an English Protestant lady, he being himself a Catholic. We have here these facts, that he was resident in *England*, that his business was carried on in *England*, and that he had married a wife in *England*. There is no evidence at this time of any intention on his part to return to *France*. I should have said that without doubt he had at that time acquired an English domicil. In 1853 he dissolved his partnership with *Barlow*, and entered into partnership with *Geoghegan*. The articles of partnership were English, and there was nothing at this time to disturb his interest in *England*. His wife died, and in 1856 he married again. His second wife was also an Englishwoman and a Protestant. He married her in *England* in a Protestant church, and there is no evidence that he took any of those steps which were necessary to perfect the marriage according to the French law, except that a certificate of his second marriage was obtained from the French consul. He

(1) 3 Ch. D. 518.
(2) Law Rep. 1 H. L., Sc. 441.
(3) Ibid. 8 Eq. 631.
(4) Law Rep. 10 Eq. 589.
(5) 10 H. L. C. 272.
(6) 4 D. J. & S. 616.

had three children by this marriage: and the year before the first child was born he made a will in the English language, leaving all his property to his wife. He must have known that as he had children, this will would not be valid according to French law. There was some difficulty about the baptism of his eldest child, but the children were brought up in the Protestant faith; his home, his business, his property, his wife and children, were all in *England*. The firm to which he belonged did not conduct its business in *France* itself, but employed an agent in *Paris;* the testator occasionally went to *Paris* to see his relations, but beyond that he had no connection with *France*. In 1872 he made the will which is now in dispute; it is certainly a remarkable one for a Frenchman to make. He describes himself as of *St. John's Wood* and of *Regent Street;* he avails himself of the provisions of the English law; he appoints a testamentary guardian to his children, and he disposes of his property, notwithstanding the existence of children, in a way which every Frenchman knows is repugnant to French law. Against this evidence there is nothing except the testimony of some witnesses that he made some declarations in casual conversations of an intention to return to *France* when he had made money enough, but this evidence is not uncontradicted by evidence on the other side of declarations that he intended to remain in *England*. I cannot help thinking it would be dangerous to admit declarations in casual conversations, even if uncontradicted, to outweigh all the acts of a man's life and every document executed by him. For it is important to observe that there is no document which expresses an intention to return to *France*, while on the other side there are two wills which are inconsistent with such an intention. In *Hodges* v. *Beauchesne* (1), Dr. *Lushington* says, "With respect to verbal declarations made by witnesses who depose thereto, no doubt such declarations are admissible evidence in these questions of domicile; but the weight to be attributed to them entirely depends on circumstances, especially the time which has elapsed since they were made; and the circumstances under which they were made. To entitle such declarations to any weight, the Court must be satisfied not only of the veracity of the witnesses who depose to such declarations,

(1) 12 Moo. P. C. 325.

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Judgment, C. A. Jessel, M.R.

but of the accuracy of their memory, and that the declarations contain a real expression of the intentions of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations." And again (1), "We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure;* a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal." The contention here is, not that the declarations can be read to shew a change back to his original domicil. but to prove that he never intended to acquire a domicil in *England.* But they are much too indefinite for that purpose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which shew an intention of permanent residence.

In all the cases a difficulty arises as to the meaning of the word domicil; but it evidently implies the intention to make the place one's home, and a home is itself suggestive of permanency. It is impossible to lay down an absolute definition of domicil, but in the present case there is every element that makes a home. The testator had no other home or place of residence: he shewed by his actions no intention to change his residence. It is true that he only took his house for three or four years, but that is not sufficient to shew an intention to change his residence. On the whole, it appears to me that there is nothing to outweigh the natural result of his acts, and that looking at his acts fairly, as a jury ought to do, the Court can come to no other conclusion than that his domicil was English. The appeal must therefore be dismissed with costs.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It is not necessary for me now to express my opinion of the general question of the value to be attached to expressions of intention. I stated my opinion on that

(1) 12 Moo. P. C. 329.

point in *Haldane* v. *Eckford* (1), and I adhere to the observations which I there made.

With respect to the present case, I hardly remember one in which the domicil of a testator was more conclusively proved. Both his marriages were acts of unmitigated scoundrelism if he was not a domiciled Englishman. He brought up his children in this country; he made his will in this country, professing to exercise testamentary rights which he would not have had if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said, that when he had made his fortune he would go back to *France*. A man who says that is like a man who expects to reach the horizon, he finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life.

Judgment, C. A. James, L.J.

BRETT, L.J.:—

Brett, L.J.

I am also of the same opinion. The Vice-Chancellor has decided that the testator, although by birth a Frenchman, died an Englishman. The question is, whether we think that, on the facts before him, he was right in that opinion. It is said that to prove a change of domicil it is necessary to shew both fact and intention. What is the fact which must be proved? It is that he had *de facto* changed his residence. What, then, was his residence? I think it is satisfactorily proved that he had taken up his residence in this country. Then as to his intention. Had he the intention of residing in *England* permanently? The definition of permanence is that it is not only for a period, either for a definite time or for a time limited by a condition. It is therefore necessary, in the first place, to determine whether the testator resided in this country as his home. It was proved that he entered into a business and a partnership in *England;* that he married an English woman, by whom he had children; and that he never expressed an intention that his wife and children should have any other home. Considering the circumstances under which he came to

(1) Law Rep. 3 Eq. 631.

C. A. 1878

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Judgment, C. A. Brett, L J.

England, and under which he married, I think it is impossible to say that the Vice-Chancellor was wrong in holding that *England* was the testator's home. Then, was any period fixed in any way? It has not been seriously urged that the testator meant to return at the end of twenty years, or of any such fixed period. But it was said that he limited the time by reference to the performance of a condition, namely, of his making a fortune. I think such a condition is not sufficient; it ought to be a condition which limits the residence to a definite time; and when the condition refers only to a time as indefinite as it can possibly be, it cannot be said to confine the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make his fortune. Therefore, as the testator did not fix a date or make any definite condition by which the residence was limited to a definite time, it must be taken that his intention was to make his residence in *England* permanent. Therefore the other proposition is established by the evidence.

JAMES, L.J.:—

I wish to add that I am disposed to think that when the testator entered the English church and declared that he knew of no impediment to his lawful marriage, he must be taken to have made a solemn declaration that he had an English domicil.

Solicitors: *T. G. Brewer; M. J. Geoghegan.*

AMOS *v.* CHADWICK.

C. A.
1878
V.-C. M.
April 17;
C. A.
July 17.

[1876 A. 108.]

Practice—Consolidation of Actions—Test Action—Abortive Trial—Substitution of another Action as Test Action—Indemnity against Costs—Rules of Court, 1875, *Order* LI., *r.* 4.

One of a number of actions brought by different Plaintiffs against the same Defendants in respect of an alleged misrepresentation in the prospectus of a company, was ordered to be a test action, the trial of which was to bind all the Plaintiffs but not to bind the Defendants. When the test action came on for trial the Plaintiff did not appear, and judgment was given for the Defendants:—

Held, that, though the order contained no express provision to that effect, the Court had power to substitute another of the actions as the test action, and that, as the trial of the original test action had failed to be a real trial of the issue between the Plaintiffs and the Defendants without any fault of the other Plaintiffs, this substitution ought to be made.

In the absence of agreement the Plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other Plaintiffs.

Statement.

THIS action and seventy-seven other actions were commenced in 1876 by different Plaintiffs against the same Defendants. The Defendants had been the promoters of a company called the *Blochairn Iron Company*, and had issued a prospectus with the view of inducing the public to subscribe for shares. The Plaintiffs had all applied for and taken shares, and they claimed damages from the Defendants on the ground that the prospectus contained fraudulent misrepresentations by which the Plaintiffs had been induced to apply for their shares. On the 23rd of February, 1877, upon the application of the Plaintiffs in all the actions, and upon the undertaking of the Plaintiffs in all the actions respectively that, so far as they were respectively concerned, the action of *Robinson* v. *Chadwick* (one of the seventy-eight) should be treated as a test action, and should decide their rights in all the other actions respectively as against themselves, but if the Defendants in any of the other actions should decline to accept the judgment in *Robinson* v. *Chadwick* as deciding the other actions, or any of them, then as to any or such of the other actions in which the Defendants should decline to accept the judgment in *Robinson* v. *Chad-*

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wick, such other actions were to go to trial respectively; and the Plaintiffs in *Robinson* v. *Chadwick* and in *Smith* v. *Chadwick* (another of the seventy-eight actions) respectively undertaking that those actions respectively should be prosecuted with due diligence, Vice-Chancellor *Malins* ordered that the time for the delivery of the statement of claim in the actions respectively, other than *Robinson* v. *Chadwick* and *Smith* v. *Chadwick*, should be enlarged until fourteen days after judgment should have been given in *Robinson* v. *Chadwick* on the trial thereof or until further order (1). At the time when this order was made the statements of claim in *Robinson* v. *Chadwick* and *Smith* v. *Chadwick* had been delivered. On the 19th of March, 1878, *Robinson* v. *Chadwick* came on for trial before Mr. Justice *Fry*, to whom it had been transferred. The Plaintiff then asked that the trial might be postponed for a month, on the ground that he was not in a fit state of health to be examined in Court. It also appeared that he had requested the Plaintiffs in the other actions to give him an indemnity against costs, and that they had declined to do so. The Judge refused to allow the trial to be postponed, and the Plaintiff then declined to proceed with his case. The Judge thereupon dismissed the action with costs (2). The Plaintiffs in the other actions then applied to Vice-Chancellor *Malins* to vary the order of the 23rd of February, 1877, by substituting *Smith* v. *Chadwick* as the test action in place of *Robinson* v. *Chadwick*. The application was heard on the 17th of April, 1878.

Glasse, Q.C., and *Romer*, for the Plaintiffs.

J. Pearson, Q.C., and *Russell Roberts*, for the Defendants.

Judgment. V.-C. M.

MALINS, V.C.:—

The result of what has taken place is that Mr. *Robinson's* action has never been tried. He, who had been selected as the representative of seventy-seven other persons, has thought fit, ignominiously, I may say, to retreat from the contest. It may well be, for aught I know, in a case like this, that the selected Plaintiff may be bought off by the Defendants. Suppose a Defen-

(1) 4 Ch. D. 869. (2) 7 Ch. D. 878.

dant in a similar case to this were to go to the selected Plaintiff and say, "You have £500 embarked in this case; it is a terrible thing for us to go on with the action; don't say anything about it, but here is double the amount you can ever recover in the action, and your costs," and then the Plaintiff settles. Is he to bind the seventy-seven Plaintiffs in the other actions by such a proceeding as that? When I ordered that *Robinson's* action should be the test action, what was my meaning? That it should be fought out to the last, and should produce the judgment of the Court upon the evidence. Has it had that effect? Could Mr. Justice *Fry* have expressed any opinion on the merits of the case? He never had the opportunity, because Mr. *Robinson*, who ought to have elicited that opinion, withdrew from the case. If he did not desire to proceed on his own account, he ought to have said to the seventy-seven other Plaintiffs, "I do not want to raise this question, I am in very bad health. I am a tradesman, and I want to attend to my business. I have been selected as your representative, but I would rather have nothing more to do with it. Take it off my hands, and indemnify me against costs." The persons whose representative he was would have said, "Of course we will. If you are tired of it because you have a small stake, or from any other reason wish to retire, we desire to go on because we expect to recover a large sum of money." Nothing could, in my opinion, justify Mr. *Robinson* in withdrawing from the proceedings without giving the other parties interested the most ample opportunity of seeing that justice was done them, instead of slinking out of the case as he has done. If I were to accede to the view of the Defendants they would by a side wind escape from answering the charges made against them. Indeed they would not have any opportunity of vindicating their character from the charges made against them, and I must say that if I were in their position I would rather have the case really tried than get off in such a way. Every Judge, I think, who makes an order of this kind with regard to a test action, intends that the test action should be *bonâ fide* prosecuted, and the opinion of the Court obtained upon the question in litigation. Here the opinion of the Court has not been obtained. There has been a complete failure of justice, not by reason of any act of the seventy-seven Plaintiffs, but by the act of

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their representative, who has thought fit to betray them, leaving them, to use a common expression, in the lurch. I cannot, therefore, allow the judgment in *Robinson* v. *Chadwick* to bind the other seventy-seven Plaintiffs. Mr. *Robinson* has not conducted the proceedings properly, and I cannot allow them to bind the other Plaintiffs. They selected him as their representative, and there having been no *bonâ fide* trial, I must give them an opportunity of having a *bonâ fide* trial. Therefore I will allow Mr. *Smith's* action to go on. The terms of the order will be similar to those of my original order, substituting *Smith* v. *Chadwick* for *Robinson* v. *Chadwick*. I make no order as to costs.

C. A.

From this decision the Defendants appealed. The appeal was heard on the 17th of July, 1878.

Argument.

J. Pearson, Q.C., and *Russell Roberts*, for the Appellants:—

The delay in the trial of the actions is a great hardship to the Defendants. Under the old practice a nonsuit had the same effect as a judgment on the merits, unless there had been mistake, surprise, or accident. What has happened is a consequence of the other Plaintiffs not giving *Robinson* an indemnity against costs, as they ought to have done. There has been no bad faith on the part of the Defendants.

Glasse, Q.C., and *Romer*, for the Plaintiffs, were not heard.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is really an appeal from the exercise by the Vice-Chancellor of his judicial discretion. What happened was this. There were seventy-eight actions brought by different Plaintiffs against the same Defendants, for alleged fraudulent misrepresentation in respect of the affairs of the same company. All the actions raise substantially the same question. Of course it would have been a scandal to the administration of justice if all the seventy-eight actions had been allowed to proceed, and in some way or other provision ought to have been made for the trial of the real question between the parties in a single action, if that was possible. Sometimes such a course is not possible, because people will not

be reasonable and will not consent. In that case, I take it, the Court could stay the proceedings in all the actions but one, and see what becomes of that one. However, in the present case the parties were reasonable, and the result was that *Robinson* v. *Chadwick* was fixed upon as a test action. Through no fault that I can discover, either of the Plaintiffs in the other actions or of the Defendants, that action was never really tried. Mr. *Robinson* called upon the solicitors who acted for him as well as for the Plaintiffs in all the other actions to procure him an indemnity against costs. I cannot see that he had any right to call for that indemnity, or that there was any agreement to give it to him. It was refused, and he thereupon changed his solicitor, and when the trial came on he did not choose to appear, and he was consequently nonsuited, and judgment was entered for the Defendants on the merits.

No doubt, the Defendants being ready, and, as we are told, anxious to try the case, involving as it does a question of character, it is a hardship upon them that, through Mr. *Robinson's* conduct, no trial has yet taken place. But they have got an order against him for the costs of the action, and so far no injury has been done to them except the delay. Then the Plaintiffs in the seventy-seven other actions, who said that they were not in default, applied to the Vice-Chancellor to substitute another action as the test action, and they said to him, and I think justly, that the meaning of the order, whatever the terms of it were, was that there should be a trial, one trial, to decide the questions between the parties, and there has been no trial. It was called a test action, and although the order speaks of a judgment, what was intended was that there should be a fair trial of the question which should decide everything between the parties.

Now the Judge must decide what is a fair trial, whether there really has been a test action tried, and if he is satisfied that there has not been (and how he could come to any other conclusion on the facts of this case it is difficult to understand), surely he must have jurisdiction to modify his former order, which was intended to prevent the scandal and injustice and waste of time and money which would have been caused by trying the same question seventy-eight times over, so as to secure that which justice demands, viz.,

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that there should be one fair trial of the issues between the parties. The Vice-Chancellor acceded, and in my opinion rightly and properly, to the application to substitute another action which was ready for trial as a test action between the parties. I think that if the original order had been drafted with the approval or sanction of the Judge, it would not have been made quite in its present form, and I think it would now be desirable to reserve expressly the power of hereafter modifying the terms of the order if justice should not be done in the trial of the new test action. But I am of opinion that without any such express reservation the Judge must have the power to control the proceedings before him so as to do justice to the parties. The Vice-Chancellor has properly exercised this power, and the appeal must be dismissed.

Brett, L.J.

BRETT, L.J.:—

It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same, and the evidence would be substantially the same if they were all tried. But when one of them is ordered to be tried as a test action, that, as it seems to me, means that it is to be tried upon evidence which would be evidence in the other actions. If it happens that a judgment is obtained without evidence, that is not the sort of trial that was intended. If a test action fails to be tried by some accident, by anything, in fact, but collusion with the other parties, it has not been used as a test action, and there must always be a discretion in the Judge who made the first order to substitute some other action as the test action.

Cotton, L.J.

COTTON, L.J.:—

I also am of opinion that the order appealed from is right. We must really look at the subject of the order of February, 1877.

For the purpose of my judgment I entirely disregard the reference made in that order to *Smith* v. *Chadwick*, as an action which was to proceed for some purpose or other, and I shall deal with the order just as if it had stayed the proceedings in *Smith* v. *Chadwick* as it did those in all the other actions.

Now what was the object and intention of that order? There being this large number of actions, the object was that as against

the Defendants the question whether or no they had made statements which were false to their knowledge, or which they ought to have known to be false, should be tried in one action. The Plaintiffs were to be bound by the decision of that question in what was called the test action. Of course there might be very different questions as regards the several Plaintiffs, viz., whether or no in fact they had taken shares on the faith of the representations, and whether they believed them to be true, and therefore the Defendants were not to be bound as against the several Plaintiffs by the result of what is called the test action. But when it is said to be a test action, what is meant by that? I think the order itself shews that *Robinson* v. *Chadwick* was to be tried as a test action and to decide the liability of the Defendants, subject only to any circumstances affecting the right of the Plaintiffs in all the other actions respectively. That assumes, although it is not very carefully worded, that there will be a decision of the rights of the Plaintiffs in *Robinson* v. *Chadwick* as against the Defendants in that action, and if from any accident there is no trial of the right of the Plaintiffs against the Defendants in that action, it cannot be such a trial as was contemplated when the order was made.

Now it is admitted, and indeed cannot be disputed, that in *Robinson* v. *Chadwick* there was no trial on the merits, and no decision on the merits whether or no the Defendants had made misrepresentations. Then comes the question, was that caused by any fault of the other Plaintiffs? It seems to have arisen in this way. The Plaintiff in *Robinson* v. *Chadwick* did not like to go on without getting something which the order did not give him, without getting an indemnity against costs from the Plaintiffs in the other actions. That being so, it was not tried on the merits, and this without any default on the part of the Plaintiffs in the other actions. I do not say there was any default on the part of the Plaintiff *Robinson* except that he did not choose to go on unless he got something to which he was not entitled, but there was no default at all on the part of the other Plaintiffs. That being so, the Court ought not to bind them by the result. It is true that there was no default on the part of the Defendants, but, although that is so, in my opinion the Court ought not to bind the

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Plaintiffs in the other actions by the result of that trial, when really the merits of the case were never decided. There will be no costs of the appeal.

Solicitors for Plaintiffs: *Darley & Cumberland.*
Solicitor for Defendants: *H. T. Chambers.*

C. A. 1878 July 25.

Ex parte JERNINGHAM. *In re* JERNINGHAM.

Liquidation Resolutions—Registration—Misdescription of Debtor in Petition—Formal Defect—Amendment—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 82, 125—*Bankruptcy Rules*, 1870, *rr.* 208, 252, 257, 295—*Bankruptcy Forms*, 1870, *Nos.* 106, 111.

11 Ch D 724
726, 7-9, 736
14 Ch D 356
357
20 Ch D 285

A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:—

Held, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favour of a liquidation by arrangement ought not to be registered.

And an application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused.

Statement.

23 Ch D 708

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

On the 1st of March, 1878, *A. F. Jerningham*, a civil engineer, filed a liquidation petition. In it he described himself as of No. 6, *Great College Street, Westminster*. He had carried on his business at that address. At the time when he filed the petition his private residence was in *Scarsdale Road, Kensington*, but that address was not mentioned in the petition. Before the first meeting of the creditors he had removed to *Warwick Road, Kensington*. The creditors at their first meeting, on the 27th of March, resolved by the proper majority upon a liquidation by arrangement. The registration of the resolutions was opposed by Messrs. *Cook & Hammond*, creditors for £475 (who had dissented from the resolutions, and whose debt had been contracted by the debtor at No. 6, *Great College Street*, in the course of his business), on the grounds that the debtor was not properly described in the petition, and that he had no assets available for distribution among his creditors.

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Mr. Registrar *Keene* refused on the latter ground to register the resolutions. The opposing creditors appealed to the Court, and Mr. Registrar *Spring Rice* held that the objection as to the assets was untenable, but affirmed the refusal to register, on the ground that the debtor had been misdescribed in the petition. The debtor appealed.

Argument.

Warmington (*Roxburgh*, Q.C., with him), for the Appellant:—

If there is any misdescription at all, it is a mere formal defect or irregularity, which, according to sect. 82 of the Act, is not to invalidate any proceedings, unless the Court is of opinion that substantial injustice has been caused which cannot be remedied by the order of the Court. Here there is no suggestion that there is any creditor who did not receive notice of the meeting. The Respondents' debt was contracted in the course of the debtor's business, and so were the debts of all the creditors who have proved. The Respondents ought to shew that some harm has been done.

Sir *H. Jackson*, Q.C., and *Pollard*, for the opposing creditors, were not heard.

Judgment, James, L.J.

JAMES, L.J.:—

It seems to me that this is not a merely formal defect, but that it is a matter of substance. A debtor who is seeking to obtain the protection and privileges which are afforded by the Act must give that advertisement of the proceedings which the law requires. It is of the very first essence that he should give a proper description of himself to the world. Of all things, it is necessary that full public advertisement should be given. If a man who is living at one place describes himself as of another place, there is no security that his creditors at the place where he is living will know anything about the proceedings. It is clearly a matter of substance.

Brett, L.J.

BRETT, L.J.:—

I agree. The reason why the description in the petition is a matter of substance is this, that the advertisement of the first meeting, inserted in the *Gazette* in pursuance of rule 257, follows

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Ex parte JERNINGHAM. *In re* JERNINGHAM.

Judgment, Cotton, L.J.

5 C P D 357

the terms of the petition, and, if a wrong description of the debtor is given, his creditors may not be able to identify him.

COTTON, L.J.:—

I also am of opinion that this is a matter of substance, not a mere matter of form. The Act gives very large powers to the majority of the creditors to bind the minority, and a dissentient creditor has a right to require that the prescribed forms shall be followed with the utmost strictness. In this case a description was given of the debtor which in my opinion is inaccurate. We cannot assume that every person who was entitled to attend the meeting had the notice of it to which he was entitled. A creditor seeing the name of the debtor with the address in *Great College Street* might not suspect that it was the person with whom he had been dealing at *Kensington*. We cannot throw the burden of proving whether harm has been done upon the dissentient creditor.

The appeal was dismissed, with costs.

Warmington, for the Appellant:—

Leave should be given to amend the petition, and to issue a new advertisement of a fresh first meeting. The Court has power to do this: Bankruptcy Rules, 1870, r. 208.

Sir *H. Jackson*, Q.C., and *Pollard*, for the opposing creditors:—

An amendment cannot be allowed after the advertisement. At any rate, to allow it would open the door to fraud. And, as we have levied an execution on goods of the debtor, our rights might be prejudiced.

JAMES, L.J.:—

I think it would be a dangerous precedent. We must act strictly, and refuse to allow an amendment. The debtor ought to shew *bona fides*.

BRETT and COTTON, L.JJ., concurred.

Solicitor for Debtor: *A. G. Ditton.*
Solicitors for opposing Creditors: *Lumley & Lumley.*

In re HENLEY & CO.

C. A.
1878
V.-C. M.
June 18.
C. A.
July 14, 27, 29.

Company—Voluntary Winding-up under Supervision—Property Tax—Priority of the Crown.

Where a company is being wound up under the provisions of the *Companies Act*, 1862, the Crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding-up, in priority to the other creditors.

The decision of *Malins*, V.C., reversed.

10 Ch D. 590

Statement.

THIS was a motion on behalf of Her Majesty's Commissioners of Inland Revenue for an order that the official liquidator of *W. T. Henley & Co.* should, out of the assets of the company, pay the sum of £56 5*s.* to the Receiver General of Inland Revenue in satisfaction of the Property and Income Tax, Schedule A., due from the company in respect of certain lands at *Woolwich* held by the company up to the 5th of April, 1877, the payment to be made in priority to the other claims against the company.

The company was being wound up voluntarily under a resolution passed prior to the 5th of April, 1877, and the winding-up had been continued under the supervision of the Court.

The motion was heard before Vice-Chancellor *Malins* on the 18th of June, 1878.

Argument.

Higgins, Q.C., and *W. W. Karslake*, in support of the motion:—

The only question is whether the income tax payable by this company is to be paid in priority over other creditors, or whether the Crown must come in *pari passu* with the other creditors. The question turns upon the Acts of Parliament. The 5 & 6 Vict. c. 35, s. 63, No. 9, provides that the occupier of land shall pay the rates and taxes which are to be deducted out of the rent, and every tenant on quitting the occupation is liable for the arrears. Sect. 70 provides that the duty shall be assessed on all lands whether occupied or not, and if unoccupied, and no distress can be found thereon, the collector is to enter upon the lands at any time after when there shall be any distress to be found, and seize and sell as he might have distrained if in the occupation of a tenant.

C. A. 1878 — *In re* HENLEY & Co. — Argument.

We rely upon sect. 70 as shewing that the Crown has a clear right to enter upon the premises held by the company, and to levy a distress, and the question is whether the 87th and 163rd sections of the *Companies Act*, 1862, which are not expressed to be applicable to the Crown, control the powers given by sect. 70 so as to prevent the Crown, as it would prevent any ordinary creditor, from levying a distress after the order for the winding-up of the company under supervision. The sections of the Act 43 Geo. 3, c. 99, as to levying taxes, are by the 3rd section of 5 & 6 Vict. c. 35, incorporated in the latter Act. The Act of Geo. 3 gives power to the collector to distrain for unpaid taxes. It is clear that the Crown has priority, and has the power of levying taxes in a compulsory mode. The provisions in the Act of 1862 (25 & 26 Vict. c. 89), are sects. 87 and 163. The 87th prohibits any proceeding against the company without the leave of the Court, and the 163rd section is that any distress or execution put in force against the estate of a company being wound up shall be void. But the two sections taken together have been held to give the Court power to permit a distress under special circumstances. Our contention is that the Crown is not bound by any Act unless the Crown is named in it. That is laid down in Sir *B. Maxwell's* book on the Interpretation of Statutes (1): "The Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative." Many cases are there cited in support of that proposition.

The *Bankruptcy Act* will be relied upon in defence. By the 32nd section of the Act of 1869, it is provided that the debts therein mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, and then they shall abate in equal proportions. The debts named include all parochial and other rates having become due and payable within twelve months, and all assessed taxes, land tax, and property or income tax, but not exceeding one year's assessment. This provision, inserted with the sanction of the Crown, cuts down the right of the Crown, and confers no new right. That shews that the Crown, not being mentioned in the

(1) Page 112.

Act of 1862, cannot be affected by it. That Act does not apply in any manner to the Crown, and the Court cannot interfere with the rights of the Crown.

In the case of *In re Regent United Stores Company* (Jan. 29, 1878), your Lordship decided the question that the Queen's taxes were in the same position as local taxes, and your Lordship made an order restraining the collector from selling any effects of the company under a distress which he had levied for Queen's taxes. In the case of *In re English Joint Stock Bank* (May 24, 1866), it was said by Vice-Chancellor *Wickens* that as the Crown was not mentioned in the Act of 1862, it could not be bound by it; but the question there raised was a different one from this. The question as to priority in respect of local rates was also raised in *In re West Hartlepool Iron Company* (before Vice-Chancellor *Bacon*, March 30, 1876), and *In re Albion Steel and Wire Company* (1), where the question related to the Poor Law assessment, and it was held that the rules in the *Bankruptcy Act* giving local rates due from the bankrupt's property priority over his other debts did not, under the 10th section of the *Judicature Act* of 1875, apply to the case of a company in liquidation.

The last case in which it has been held that the Crown is not bound, unless specially named in the statute, is *Thomas* v. *Reg.* (2).

It is essential for the benefit of the public at large that the rights of the Crown as to levying taxes should be preserved.

There is this distinction between a bankruptcy and a winding-up—that in bankruptcy the whole of the property is divested out of the bankrupt and passes to the trustees, and becomes their property, while in the case of a winding-up there is no such divesting. The property remains the property of the company as it was before, subject to the provisions of the Act. The case of *King* v. *Crump* (3) shews to what extent the Crown is bound in cases in bankruptcy; and in *Maxwell* on the Interpretation of Statutes (4) the rule is laid down that where the Crown is not expressly named the inference that the statute was intended to include it must not be doubtful. It must be made out that there was a clear intention

(1) 7 Ch. D. 547.
(2) Law Rep. 10 Q. B. 44.
(3) Tremaine's Pleas of the Crown, p. 637, cited in Baron Parker's Reports, p. 126.
(4) Page 116.

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by the Act of 1862 that the Crown should be included; and failing that, we ask your Lordship to give us the order.

[They cited *Dwarris's* Statutes (1).]

Argument.

J. Pearson, Q.C., and *W. Barber*, for the liquidator:—

If the Crown is held to have priority in this case, the effect will be to prevent justice being done between one subject and another for the benefit, as it is said, of all the subjects of the realm. The foundation of all the cases in which the Crown is said to have this priority, is, that it is a debt due on record or by specialty, but not always so even in those cases. This is not a debt due on record. It is a simple debt, but there are some of the same remedies given as if it were a debt of record. That is evident from the Act 1 Vict. c. 61, s. 3; and the principle may be deduced from the case of *Uppam* v. *Sumner* (2) and *Butler* v. *Butler* (3), that even in debts of record and specialty the Crown has not absolute indefeasible priority, but it might be lost if the subject was prior to the King in taking action. It is not in all cases that the Crown has priority over the subject, but the Crown has priority where the subject has not completed his right to the effect of his judgment before the process of the Crown has been commenced. In this case there has been no distress yet levied by the Crown, and nothing was done by the Crown to obtain payment of the arrears of income tax before the winding-up order was made. The case of *King* v. *Crump* (4) is not an authority against us. The argument has been that inasmuch as the Crown is not named in the *Companies Act*, the Crown is not bound by it, but the true reason of the decision in the case cited is, not that the King's prerogative binds, but that the property was not altered, and the extent being on the same day as the assignment the extent comes before the assignment, and the King has priority because his process was commenced before the assignment took place.

As to the difference between bankruptcy and a winding-up, the property only vests in the trustee *sub modo*, because his duty is to pay the debts of the bankrupt, and if there is any surplus it

(1) Pages 524, 535.
(2) 2 Sir W. Bl. 1294.
(3) 1 East, 338.
(4) Tremaine's Pleas of the Crown, p. 637, cited in Baron Parker's Reports, p. 126.

belongs to the bankrupt. There is no real distinction between bankruptcy and a winding-up, for if there is any surplus remaining in a winding-up after payment of debts by the liquidator, that surplus belongs to the company. It is another mode of paying the debts of a debtor, and refunding the surplus to an individual in the case of bankruptcy, and to the company in the case of winding-up. The reason for giving certain debts, including Crown debts, priority by the 32nd section of the *Bankruptcy Act*, is, that otherwise the Crown would not have had priority. It should also be stated that, by the *Income Tax Act* (5 & 6 Vict. c. 35), s. 17, there is a provision for the recovery by the Crown of all duties under the Act as debts to the Queen's Majesty, with full costs of suit; but there is no allusion to its being a debt of record. It is simply a debt due to the Crown, and not a debt due on record. There is, therefore, a marked difference between this Act and the Act of 43 Geo. 3, c. 99, by which the taxes were recoverable as debts due on record. If it had been intended to make this a debt of record, words to that effect would have been inserted in the Act. The prerogative of the Crown is confined to debts of record: *Williams* on Executors (1).

Higgins, in reply:—

That this is a debt of record is plainly shewn by 1 Vict. c. 61, s. 3, which recites the 43 Geo. 3, c. 99, s. 45, and also recites 5 & 6 Will. 4, c. 20, s. 13. The Act of Geo. 3 recites that such part of the debts due to the Crown as could not be so levied and collected as is therein mentioned may be recoverable as a debt upon record to the King's Majesty; and then it recites that doubts had arisen as to the construction of those Acts, and it provides that all taxes then made or thereafter to be made may be recovered as debts of record are recovered, that is, shall be treated as a debt of record.

As to the case of *Uppam* v. *Sumner* (2), that has been overruled, and is now of no value, and the principle of the case is not applicable to this; and there are the two cases, *Rex* v. *Wells* (3) and *Thurston* v. *Mills* (4), in which *Uppam* v. *Sumner* is reviewed; and *Cooper* v. *Chitty* (5) is also an important case upon this subject.

(1) 7th Ed. p. 992.
(2) 2 Sir W. Bl. 1294.
(3) 16 East, 278.
(4) Ibid. 254.
(5) 1 Burr. 20.

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Argument.

Our contention is, that the Crown has priority as having a debt of record, and also it has priority by virtue of the statutes enabling a distress to be levied.

Then as to the analogy derived from the bankruptcy law. The difference between the Act of 1862 and the Act of 1856 is not merely one of form. The scheme of the Act of 1862 is to keep the company as a corporation with all the rights of a corporation, except so far as those rights may be temporarily suspended or modified by the interference of the Court, and the appointment of an official liquidator. There would be a perfectly good winding-up without any official liquidator being appointed.

Judgment, V.-C. M.

MALINS, V.C. :—

This question is certainly one of considerable importance, although, I am inclined to think, not of so much importance as has been attached to it, because I believe there are very few cases in which there is any income tax due from companies which are being wound up.

With regard to the general question as to Crown debts, I do not think the general law on the subject admits of much doubt, because there has never been any doubt that with regard to certain debts the Crown has priority over general creditors, and it is equally clear that as to other debts the Crown has not that priority. The question is, whether it has that priority with regard to this particular debt for income tax. Now, to shew that the Crown has not a general priority over other creditors for all debts, I need not do more than refer to that passage which has been read from Mr. Justice *Williams*' Treatise on the Law with regard to Executors, and which, I believe, states the law with perfect accuracy, namely, "But the debts due to the Crown which are so privileged" as to have priority "are confined to such as are due by matter of record or by specialty, &c. (which are of the same nature: for by statute 33 Hen. 8, c. 39, it is enacted that all obligations and specialties taken to the use of the King shall be of the same nature as a statute staple). And therefore sums of money owing to the King on wood sales, or sales of tin or other his minerals for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. So, though fines and amerce-

ments in the King's Court of Record are clearly debts of record and entitled to such preference, yet amercements in the King's Courts Baron or Courts of his Honour which are not of record have no such priority," and so forth. There is no general priority, therefore, in all cases for Crown debts over the debts of the subject. What, then, are the rights with regard to this particular debt for income tax? The income tax was first levied in 1842, by the Act 5 & 6 Vict. c. 35. Mr. *Higgins* has referred me to that Act, and particularly to sect. 63, which states in what manner the debt is to be paid, and by whom it is to be paid, and he referred more particularly to No. 9 of the rules and regulations contained in that section with regard to particulars of deductions and allowances in respect of duties. It is there stated that assessments are to be levied on the occupier, and allowed by the landlord out of the rent. Then, with regard to the nature of the debt, I am referred to 43 Geo. 3, c. 99, to shew that all debts due to the Crown are specialty debts or debts of record; and I am referred to 1 Vict. c. 61, which in point of fact relates to debts due to the Crown for taxes generally. It recites the old statute of 43 Geo. 3, c. 99, and other statutes, and then it proceeds: "Whereas doubts have arisen as to the construction of the said Acts, and it is expedient to amend the same, be it therefore enacted that all and every the said duties of assessed taxes contained, charged, or assessed in or by any assessment already made or to be at any time hereafter made, may be sued or prosecuted for and recovered, with full costs of suit and all charges attending the same, of and from the person and persons respectively charged therewith in Her Majesty's Court of Exchequer at *Westminster* by information in the name of Her Majesty's Attorney-General, as a debt or debts due to the Queen's Majesty, her heirs and successors, or by any other ways or means whereby any debt of record or otherwise due to the Queen's Majesty can be recovered." So, because it may be recovered in the same way as a debt of record, Mr. *Higgins* argues that it is therefore a debt of record. I am of opinion that argument is wholly unsustainable, that it is not a debt of record, but that it is a debt due to Her Majesty, to be recovered in the manner prescribed by the *Income Tax Act* (5 & 6 Vict. c. 35). Then it is by the 172nd section very distinctly shewn

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that the Commissioners "executing this Act in relation to any of the duties hereby granted shall, within one calendar month after the first day of hearing appeals, all appeals then made being first determined, issue out and deliver to the respective collectors, duplicates of the assessments of the aforesaid duties." And then it provides: "that all such duties as shall be assessed or charged under any of the provisions of this Act, if not paid, levied, or collected according to the directions herein mentioned, shall be recoverable as a debt to the Queen's Majesty, with full costs of suit." They are therefore to be recovered as debts due to Her Majesty, not as debts of record, nor anything which amounts to debts of record, but simply—if I may use the expression—as a simple contract debt due to the Crown. Then what is the position of the debt?

The Act of Parliament having prescribed the mode in which the debt shall be recovered, and the nature of that debt, the question is whether, when a company is wound up, the Act of Parliament has reserved, or whether it necessarily implies, that the Crown has priority over the general creditors. The Bankruptcy Acts are of much older date than the Winding-up Acts. Winding-up Acts are of a very modern introduction, whereas Bankruptcy Acts, as we know, have existed since the time of the reign of Queen *Elizabeth*, and the object of the Bankruptcy Acts is no doubt twofold: first of all to distribute the assets of a debtor or bankrupt equally among his creditors; and, secondly, to relieve the debtor from the amount of his debts in order to make him a free man again, which it has always been considered to the interest of the State he should be, in order that he may begin to trade again. The primary object of the Winding-up Acts has been to insure the equal distribution of a company's assets among its creditors, therefore the object is not the same as that of the Bankruptcy Acts. The Bankruptcy Acts vest in the assignee, as he was originally called, or the trustee, as he is now called, all the estate and property of the bankrupt of every description; while under the Winding-up Acts, on the appointment of an official liquidator, the property of a company does not vest in him, but remains in the company, which has still a corporate existence, until it is finally dissolved upon the comple-

tion of the winding-up; but although the property remains in the company, the equitable interest in it is in the official liquidator, in my opinion, for the benefit of the creditors; but he has, subject to the control of the Court, a complete dominion over the property, and he has that complete dominion for the purpose of dividing the assets equally amongst the creditors. Now, in the case of a compulsory winding-up, this depends on the 95th section of the Act of 1862, which says that the official liquidator shall have power, with the sanction of the Court, to bring or defend actions or other legal proceeding in the name and on behalf of the company, to carry on the business of the company, and to sell the property and effects. Then he is to do all acts in the name of the company, and to take steps for distributing the assets, which assets are to be divided rateably amongst all the creditors; and the section which applies to this particular case, which is that of a voluntary winding-up under supervision, is sect. 133; and that provides that the following consequences shall ensue upon the voluntary winding-up of a company: first, the property of the company is to be applied in satisfaction of its liabilities *pari passu*, "and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then liquidators are to be appointed to make calls and adjust the rights of the contributories, and pay the debts of the company *pari passu*. Now, here there is no exception of the Crown whatever, and it would certainly be remarkable that, if it was intended that the Crown should have this priority, there should have been no provision made on the subject. This Act was passed after great deliberation by the Legislature. It embodies all the preceding Acts for winding up, and if this difficulty with regard to the Crown having priority was intended to be touched, surely it would be impossible to suppose that the Law Officers of the Crown would not have attended to this matter, and that they would not have taken care that that priority, if it was considered that the Crown should have it, would have been reserved. But nothing of the kind is found here. On the contrary, the Crown gives its consent to the Act, which says that all the property of the company shall be applied in satisfaction of its liabilities *pari passu*. This particular liability of the company is

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one in respect of £56 5*s.* for income tax; their liability to the other creditors is just the same kind of liability, and it is said that their assets are to be distributed *pari passu.*

Now, there is a similar matter in *pari materia* in the *Bankruptcy Act.* It is very true that the *Bankruptcy Act* of 1869 is seven years younger than the *Companies Act,* 1862, but although Mr. *Higgins* has pointed out that there is no provision in any of the earlier Acts as to income tax, there is a provision as to Queen's taxes in general; and in the 32nd section of the Act of 1869, which is only a re-enactment of the law as it was before with slight additions, it is provided that the debts thereinafter mentioned shall be paid in priority to all other debts; that is to say, all parochial or other local rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time, all assessed taxes, land tax and property or income tax assessed upon him up to the 5th day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment. Therefore, in this case, where the attention of the Legislature was directed to the matter, and where the framers of the Act had it before them, they do not reserve priority as against the general creditors in respect of income tax without any limit, for whatever may be due is but for one year only. It might be that a large amount of income tax would be due from a bankrupt by reason of his not having made full returns of his property, and yet against his estate only one year's income tax can be recovered. Why is this? Because it was thought reasonable that in arranging the liability of the debtor, it should be so. It was felt that the Crown ought not to have the whole, but that it should have one year's tax, as in the case of a landlord, who has always one year's rent reserved to him before the property can be distributed in respect of arrears of rent. Therefore, in this case, where the attention of the Crown has been drawn to the matter, one year's arrears is the extent which can be recovered out of the assets of the bankrupt. The 49th section of the same Act reserves the liability of the bankrupt to pay the Crown debts;—notwithstanding his bankruptcy he is still liable for the Crown debts, the consequence of which would be, I take it, that if the assets were only sufficient to pay 10*s.* in the pound for

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one year's tax, or for whatsoever was due to the Crown, he would remain personally liable. But the question I have to determine here is, to what extent the assets of the company are liable to the Crown as between the Crown as one creditor and the other creditors as a general body.

Now, with regard to these old doctrines as to priority and the extent of the right of the Crown, I confess that after all I have heard from Mr. *Higgins* and Mr. *William Karslake*, I am very much disposed to think that that decision of *Uppam* v. *Sumner* (1) still remains law, which is that the extent of the right of the Crown is postponed to a judgment previously obtained. Therefore, if a judgment is obtained and duly entered up so that it becomes a charge on land on the 1st of January, and a distress is issued on the 2nd of January, under these Acts I take it that the judgment entered up on the 1st of January would have priority, and there it is so decided; but in order to test these questions of priority, which are questions of general charges on the land, and not questions of the general application of the assets of a company, we must see which of these processes amounts to a charge on the land.

Now, therefore, finding that in one body of law for the distribution of the estates of debtors incapable of paying in full, the right of the Crown to priority of payment is reserved, as to Queen's taxes, to a limited extent, that is, for one year, but that in the Acts for winding up it has not been done, how can I say that it was intended by those Acts to reserve the right of the Crown to any extent whatever? It seems to me wholly unsustainable that, having provided that all the liabilities are to be paid *pari pasu*, and there being no reservation of the rights of the Crown whatever, I can put that construction upon it. It seems to me to follow that the right of the Crown, the Crown not having levied, for if the Crown had levied beforehand it would have been a different thing—but the Crown, having taken no steps beforehand to recover, must come in under the provisions of the *Companies Act*, and that these claims must be paid *pari passu* with those of the other creditors.

The 163rd section of the *Companies Act* enacts that, "where

(1) 2 Sir W. Bl. 1294.

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any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents." There is no exception made of a distress by the Crown, or of any process of the Crown, or any mention made of the Crown whatever, but it is expressed generally that all such proceedings shall be void to all intents. No doubt it is perfectly accurate, as Mr. *Higgins* has argued, that the 163rd section must be taken in connection with the 87th section, which provides that where an order has been made for winding up a company no action shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose; but in the exercise of my discretion I do not give any leave, because I am satisfied that no right of the Crown was intended to be reserved, and that no right is reserved.

I am of opinion, therefore, that the 133rd section regulates the rights of the parties, and that section provides that the general liabilities of the company are to be paid *pari passu*.

Upon the subject of costs, the Crown, I believe, is not now exempted from payment of costs. I decided against the Crown in Chambers, and it has now been brought into Court upon summons by the Crown, therefore I think the Crown should pay all the costs, including the costs of the summons and the adjournment into Court. The case has been very well argued, and I have had all the information I could have had. I have not gone into all the old authorities, because I think they have not much application to this matter.

C. A.

From this decision the Commissioners of Inland Revenue appealed. The appeal was heard on the 24th of July, 1878.

Argument.

Higgins, Q.C., and *W. W. Karslake*, for the Appellants.

J. Pearson, Q.C., and *W. Barber*, for the liquidator.

The same arguments were adduced as in the Court below. The following authorities were referred to: *Giles* v. *Grover* (1); *Uppam*

(1) 1 Cl. & F. 72.

v. *Sumner* (1); *Rex* v. *Wells* (2); *Sir T. Cecil's Case* (3); *Williams* on Executors (4); *Bacon's* Abridgment (5); *Maxwell* on the Interpretation of Statutes (6); *In re Albion Steel and Wire Company* (7); *In re Regent United Service Stores; Buckley* on Joint Stock Companies (8); *Manning's* Exchequer Practice (9).

JAMES, L.J.:—

Judgment, C. A. James, L.J.

It appears to me clear on every principle that the Crown is not bound by the *Companies Act*, 1862, not being specially mentioned in it. The Crown is not debarred, in respect of any sum of money due to it, from taking proceedings against the property of the debtor; and by the *Income Tax Act* the right is given to the Crown to distrain upon any of the debtor's chattels for the arrears of the tax. Independently of that Act, it is a debt due from the person in possession of the property in respect of which it is claimed. The company is in possession of the property; they are the tenants, and are liable to pay the tax. Therefore there is nothing to prevent the Crown from suing the company or distraining their chattels, not only on the property, but anywhere else. There being this right, the Crown says that it does not wish to exercise its power of distress, but instead of that, asks to be paid in priority to the other creditors; and the liquidator, on behalf of the company, is ready to admit that right. That being so, it being clearly a debt due to the Crown, and a debt in respect of which the property of the company might be taken, I think it is right and proper that the liquidator, as an officer of the Court, should pay the debt without allowing the distress to be made.

But if the matter is treated as a matter solely of administration of assets under the direction of the Court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract,

(1) 2 Sir W. Bl. 1294.
(2) 16 East, 278, n.
(3) 7 Rep. 18 b.
(4) 7th Ed. 991, 993.
(5) Prerogative, E. 4; Executor, L. 2.
(6) Page 112.
(7) 7 Ch. D. 547.
(8) Page 336.
(9) Pages 2, 12.

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there being a right of priority in the Crown, it is right that the debt should be paid.

Judgment, C. A. Brett, L.J.

BRETT, L.J.:—

I am of the same opinion. There are two prerogatives of the Crown bearing upon this question. The first is, that the Crown is not bound by a statute in which it is not specially mentioned. Therefore the Crown is not bound by the *Companies Act*. It follows that, this being clearly a debt for which the Crown can distrain, its power of distress is not taken away by the Act, and it can proceed to distrain in this case. It is therefore right that the debt should be paid in priority to the other creditors.

But suppose we regard it merely as a simple contract debt; then in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in whichever way we look at the question, I think the Crown ought to be paid this debt in priority.

Cotton, L.J.

COTTON, L.J.:—

I am also of the same opinion. In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication. In this case the Crown had a clear right of distress on the property of the company, and the question is, whether that right is taken away by the *Companies Act*, 1862. It is clear to me that this Act does not apply to the Crown. It has been so held with regard to the Bankruptcy Acts, and in my opinion the same principle applies to the Winding-up Acts. Their object is only to secure a division of the assets among the creditors. That being so, the Crown, having a right of distress which is not taken away by the statute, says, "I do not desire to go in and exercise my right of distress if the debt is paid in some other way." Then the Court may direct the liquidator to pay the Crown in priority to the other creditors, rather than oblige the Crown to enforce its right by distress. That is my way of looking at the present case.

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But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown has when in competition with other creditors, of being paid in priority. I think, therefore, in either view, that the Vice-Chancellor's decision ought to be reversed, and that the liquidator ought to pay this debt.

Solicitor for Crown: *Solicitor to the Inland Revenue.*
Solicitor for Company: *J. W. Starkey.*

ASHWORTH *v.* OUTRAM.

C. A.
1878
V.-C. M.
July 25.
C. A.
Aug. 7.

[1876 A. 35.]

Costs—Shorthand Notes.

On the hearing of an application before Vice-Chancellor *Malins* the solicitors of the Plaintiff and Defendant agreed that a shorthand writer should be employed at the joint expense of the Plaintiff and Defendant to take notes of the proceedings. An order was made in favour of the Defendant, from which the Plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writer's notes. The Taxing Master, in taxing the Defendant's costs of the appeal, disallowed the costs of copies of the shorthand notes, except those of the judgment of the Vice-Chancellor, and also disallowed the sum paid by the Defendant to the shorthand writer:—

Held, by Vice-Chancellor *Malins*, that both the above items ought to be allowed:—

Held, by the Court of Appeal, that the Taxing Master could not allow these items without a special direction from the Court, and that as the Court of Appeal in dismissing the appeal had not given any directions as to them, they could not be allowed, and that the agreement between the solicitors did not make any difference in the case.

Statement.

THE Plaintiffs having appealed from an order of Vice-Chancellor *Malins*, made on the 15th of March, 1877, the Court of Appeal, on the 17th of May, 1877, dismissed the appeal with a direction that the Plaintiffs "do pay to the Defendant *S. Outram*, widow, her costs of this appeal, to be taxed by the Taxing Master" (1).

Before the hearing in the Court of Vice-Chancellor *Malins* the

(1) 5 Ch. D. 923.

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solicitors of the Plaintiffs agreed with the solicitors of the Defendant that a shorthand writer should be employed at their joint expense to take notes of the proceedings, which was accordingly done.

The bill of the Defendant's costs of the appeal included the following items:—

	£	s.	d.
"Two copies shorthand notes, fol. 1289, each . .	42	19	4
"Paid for Shorthand writer's charges as agreed .	33	16	0."

The Taxing Master disallowed these items. The Defendant carried in objections to the disallowance, "Because an agreement was come to by the solicitors of the Plaintiffs and of the Defendant that a shorthand writer should be employed at the joint expense of the Plaintiffs and of the Defendant, to take notes of the proceedings and evidence, and the shorthand notes above-mentioned were taken in pursuance of such agreement, and were actually used by both the Plaintiffs and the Defendant, and also by the Court of Appeal, on the argument before the said Court of Appeal of the appeal from the Vice-Chancellor's order of the 15th of March, 1877.

"As to the said item of £33 16*s.* above-mentioned, because the item is an actual payment made by the Defendant's solicitors to the agents of the Plaintiffs' said solicitors of one moiety of the costs of taking the said shorthand notes in pursuance of the said agreement."

The copies of the shorthand notes included the arguments of counsel, the *vivâ voce* evidence, and the judgment of the Vice-Chancellor. The Taxing Master, on the objections being brought before him, modified his taxation by allowing so much of the first item as was attributable to the copies of the judgment of the Vice-Chancellor, but disallowed the rest, and adhered to his disallowance of the second item. The Defendant took out a summons to review the taxation, and the Vice-Chancellor in Chambers decided that both the items ought to be allowed. The Plaintiffs moved to discharge this order on the 25th of July, 1878.

Glasse, Q.C., and *Nalder*, for the motion.

J. Pearson, Q.C., and *Freeling, contrà.*

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Judgment, V.-C. M.

MALINS, V.C.:—

This is a case in which there were a number of witnesses examined *vivâ voce*, and it was well known to the solicitors on both sides that the evidence would be very contradictory. They therefore agreed beforehand that there should be one shorthand writer employed. Mr. *Glasse* says it was agreed that they should pay the expenses of the shorthand writer equally between them. On the other hand, Mr. *Pearson* says the agreement was that the costs should be costs in the action, that is, that this was a proper expenditure to be allowed in the taxation of costs. I have no doubt whatever that each party had made up his mind to appeal before the trial came on, if the decision should be against him. With what view then was the evidence to be taken? I think it was because both parties agreed that it would be necessary for the information of the Court of Appeal, and if there was no appeal then the shorthand notes would be necessary for the information of the solicitors on each side. My opinion is that they were proper costs on the appeal, and that they were properly taxed as costs in the cause. The mode of taking evidence by *vivâ voce* examination has introduced an entirely new system in conducting the trial. I always make a point of taking full notes myself of the evidence, but when I know that a shorthand writer is engaged, I occasionally refer for the purpose of saving time to the shorthand notes. What I have said, applies more particularly to the notes of the evidence. I understand that the notes of the judgment are not objected to, but there remains the question as to the notes taken of the speeches of counsel. There might have been a doubt whether the costs of taking the speeches should have been allowed, but as both parties knew that the speeches were taken, and raised no objection at the time of the trial, I am of opinion that they cannot now be objected to. Therefore I think all the costs of the shorthand notes should be allowed as costs in the cause. The motion will therefore be refused with costs.

The Plaintiffs appealed. The appeal was heard on the 7th of August. C. A.

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Argument.

Glasse, Q.C., and *Nalder*, for the Appellants:—

The Taxing-Master proceeded according to the regular practice in disallowing these items. Such expenses cannot be allowed without a special direction from the Judge, which should be asked for at the time when judgment is delivered: *Kirkwood* v. *Webster* (1); *Bigsby* v. *Dickinson* (2). The agreement to share the expense of a shorthand writer does not make that expense part of the costs in the action: *Brooke* v. *Wigg* (V.-C. B., July 27, 1878).

J. Pearson, Q.C., and *Freeling*, *contrà*.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the Taxing Master properly disallowed these items in taxing the costs of the appeal, and that the decision of the Vice-Chancellor cannot be sustained. The agreement between the solicitors does not appear to me to make the slightest difference in the case, it was a mere arrangement for saving expense, and leaves the case on the same footing as if each party had employed his own shorthand writer. It is clear that the Taxing Master could not allow these items without the special direction of the Court. If such a direction had been asked for when the case was before the Court of Appeal, possibly it would have been given; but it was not asked for, and we can only take the order as it stands. It is a simple dismissal of the appeal with costs, without any special directions, and these costs were properly disallowed.

Brett, L.J.

BRETT, L.J.:—

Under the order of the Court of Appeal as it stands, the Taxing Master could not allow these costs, and the order of the Vice-Chancellor is, in substance an alteration of that order, which alteration the Vice-Chancellor had no power to make.

Cotton, L.J.

COTTON, L.J., concurred.

Solicitors: *Layton & Jaques; Sewell & Edwards.*

(1) *Ante*, p. 239. (2) 4 Ch. D. 24–32.

ROBINSON *v.* FINLAY.

[1877 R. 116.]

WARD *v.* ROBINSON.

[1877 W. 241.]

C. A.
1877
V.-C. B.
Nov. 24.
C. A.
1878
May 10, 13, 14

Trade-mark—Exporting Agent—Custom of Manchester.

An arrangement was made between *W.*, *R.*, and *G.*, that *W.*, a manufacturer, should consign cotton cloths to *G.* in *Rangoon*, paying him an inclusive commission. The goods were to be exported through *R.*, who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from *G.* A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of *R.*'s name and arms, and of a symbol which had formerly been used by *G.* After goods had been regularly exported for some years under this arrangement, *W.* ceased to send goods through *R.*, and commenced exporting them to *Rangoon* through the agency of *F.*, continuing to use the old mark, except that the name and arms of *F.* were substituted for those of *R.* At the same time *R.* commenced exporting other goods under the old mark.

Cross actions were commenced for injunctions, in which *R.* set up an alleged custom in *Manchester*, giving the right to the trade-marks to the shipping agent:—

Held, upon the evidence, that no such custom existed.

Held, also, that neither *R.* nor *W.* had any exclusive right to the use of the mark, and that both actions must be dismissed.

Statement.

IN the year 1870, *Robinson*, who was a shipping agent or commission merchant at *Manchester*, and had dealings with *Galbraith & Co.* at *Rangoon*, introduced *Ward*, a cotton manufacturer, to a member of the firm of *Galbraith & Co.*, and an arrangement was come to for *Ward* to consign white shirtings to *Galbraith & Co.* at *Rangoon* through *Robinson*. *Ward* agreed to pay to *Galbraith & Co.*, as consignees, a commission of £8 per cent., but did not engage to pay anything to *Robinson*, who, however, by an arrangement between himself and *Galbraith & Co.*, was to receive out of the £8 per cent. payable to them a commission of £1 per cent. The bleaching and finishing of the goods was to be done under the direction of *Robinson*, but at the expense of *Ward*. It was agreed that the goods should be stamped with certain marks. Upon the

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outer fold of each piece were two tickets, one of which bore the arms and crest of *Robinson*, the other contained an elephant which was suggested by *Galbraith & Co.* Over each ticket were stamped the words "superior manufacture," and under those words were stamped the words "*George Robinson & Co., Manchester.*" In the middle of the fold, between the two tickets, was stamped the figure of a stag, which was a mark that had previously been used in the trade, but *Robinson* alleged that he had chosen it on the present occasion because a stag bearing a shield was part of his own armorial bearings. Below the stag was a set of numbers known in the trade as "range numbers," 000, 111, 222, and so on up to 999, denoting the quality of the cloth. These range numbers had never before been used, except that some of them had been used on *Ward's* goods shipped to other markets. Business was carried on upon this footing on a large scale for seven years, *Ward* generally supplying goods of his own manufacture, but sometimes, when his mills were in full work, sending similar goods, which he purchased from other makers. These marks were settled by arrangement between the parties for the purpose of this particular business, and confined to it, but beyond this no special agreement between them as to the right to the marks was proved. Neither the range numbers nor the general combination was ever, during the continuance of business under the arrangement, used on any other goods than *Ward's*.

In the beginning of 1877 *Ward* ceased to send out goods through *Robinson*, and commenced sending out to *Rangoon*, through *Finlay & Co.*, goods bearing marks similar to the above marks in general arrangement, but having the name and arms of *Finlay* substituted for those of *Robinson*, and the stag replaced by an antelope. At the same time *Robinson* commenced shipping to *Rangoon* goods not manufactured or exported by *Ward*, and used upon them the old range numbers and the entire combination of marks without any alteration.

Robinson and his partners, on the 7th of June, 1877, commenced an action against *Finlay & Co.*, and *Ward*, to restrain them from using or imitating the old marks which he claimed as his own trade-marks. *Ward*, a few days afterwards, commenced his action against *Robinson & Co.* to restrain them from exporting to *Ran-*

goon any shirtings not made by *Ward* bearing marks similar to those used by *Ward*.

Statement.

Robinson made the case that, according to the custom of the trade in *Manchester*, all marks placed upon exported goods were, in the absence of express agreement, the trade-marks of the shipping agent or shipping merchant, whether the goods so shipped were his own or were shipped by him as agent for the owner of them. A great deal of evidence was gone into on this question. One witness, who had carried on a very large business at *Manchester* in exporting goods both on his own account and on commission, deposed that there was no known and universal custom on the matter in *Manchester*, and that when his firm, on exporting manufacturers' goods on commission, got up a set of marks for the purpose, they took a written agreement from the manufacturer that the marks should belong to themselves; and the witness considered that if this was not done they had no right to prevent the manufacturer afterwards using the marks. Another very large *Manchester* exporter gave evidence to the same effect, with the qualification that, if part of the marks consisted of the commission agent's name and crest, he considered that the manufacturer would not be at liberty to use this part of the marks after the agency had ceased, but it would remain the exclusive property of the exporting agent. He agreed as to there being no known custom in *Manchester* which would determine the right to the marks in the absence of special agreement; and this was the general effect of the evidence.

It was alleged by *Ward* that the range numbers and the general combination were the features by which the natives recognised the goods; that English names and words were of no importance; and that *Robinson's* name would be unknown to the purchasers. *Robinson* maintained that his arms and crest, if not his name, formed the essence of the trade-mark, and proved that in a price current sent to *England* from *Rangoon*, the goods were quoted as "*Robinson's*."

The actions were heard before Vice-Chancellor *Bacon* on the 24th of November, 1877.

Argument.

Sir *H. Jackson*, Q.C., and *Bryce*, for *Robinson*, contended that *Robinson* was entitled, by virtue of his engagement with *Ward* and

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the custom of the trade, to the absolute property in these marks which had been designed by him and affixed to the goods which he was employed to ship to *Rangoon*.

Hemming, Q.C., *A. L. Smith*, and *Grosvenor Woods*, for *Ward*:—

Robinson was employed in the transactions as *Ward's* agent for shipping the cottons to *Rangoon*, and could not dispute the title of his principal to all trade-marks used in the business except the arms and crest of *Robinson*, which were recognised as marks personal to him. Trade-marks in their nature indicate ownership, and never are understood to point to a mere agent. The vendor of the goods is the owner of the goodwill of the trade, and therefore of the trade-marks which protect it.

The custom alleged by *Robinson*, that the shipping agent is entitled to the marks affixed by him to denote his principal's goods, is inconsistent with the relation of principal and agent in which the parties stood: *Mollett* v. *Robinson* (1); and further, an agent can derive no profit from his employment but that for which he has, by his contract of agency, expressly stipulated. But as a matter of fact no such custom was proved.

Judgment, V.-C. B.

BACON, V.C.:—

Mr. *Robinson*, a member of a firm at *Manchester*, admittedly of great reputation and with very extensive dealings, has carried on for many years the business of exporting goods from *England*, and procuring the sale of them in foreign parts. Mr. *Ward* is a manufacturer of cotton in *England*, and his commodity goes naturally and usually to foreign parts. The parties came together and agreed that *Robinson* should export to *Rangoon* goods of the manufacture of Mr. *Ward* that they might there be sold for Mr. *Ward's* benefit; and one of the many arguments urged was, that the trade so established was *Ward's* trade and not *Robinson's*. That is a very important question, and is only to be solved by the consideration of the relation of the parties and the transactions between them. Mr. *Ward* manufactures cotton, Mr. *Robinson* undertakes to ship through the agents *Galbraith* (who may as well be left out for all the purposes I am considering now, because

(1) Law Rep. 7 H. L. 802.

they are mere agents), for sale at *Galbraith's* house at *Rangoon*, the cotton manufactured by Mr. *Ward*. But that is not all. Mr. *Robinson* has an established reputation as a merchant bringing goods into foreign markets; it was, therefore, necessary that he should take precautions for the protection of that established trade of his. Although he acted in a sense as the agent of Mr. *Ward*, it cannot be said with any reason or propriety that that rule of law which has been invoked in the course of the discussion, that an agent can take no greater benefit than that which he contracts for with his principal, has the slightest application to the case before me, even if it be treated as a case between principal and agent. Mr. *Robinson* has his own independent substantive business to look to. He goes into that business and, as a part of it, sends to *Rangoon* Mr. *Ward's* goods. He first of all has his own reputation to protect, and he has the goods sent to him in their raw state, and has them bleached by bleachers whom he employs and in whom he has confidence. He has the goods finished, so that they are in a fit state to be presented in the market at *Rangoon*. Then, for the protection of his trade, and also for the benefit of the sale which he was to make for Mr. *Ward*, he suggested that it was necessary that these should have a distinctive mark, which is commonly called a trade-mark, and this is discussed between *Ward* and *Robinson;* and Mr. *Robinson* combines several devices which he thinks the best calculated to secure a sale in the *Rangoon* markets. There being different qualities of this cloth, it was necessary that their difference of quality should be distinguished by numbers, and accordingly what is called a range of numbers is put upon the proposed device. [His Lordship, after referring to the other marks, continued:—] But all these, whencesoever they may have been derived, were combinations made by Mr. *Robinson*, and for the purpose of distinguishing those goods the sale of which he undertook. This is agreed to be adopted by Mr. *Ward*. He says the design was submitted to him and approved, and ultimately it assumed that shape which has appeared on the things exhibited. In that state of things Mr. *Robinson*, being satisfied that the finishing had been perfected, and that the goods were in such a state as that he could, having regard to his own reputation and established business of an export

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merchant, submit them for sale to the *Rangoon* market, put on the goods besides that an inscription certifying that the goods are of superior manufacture, selected by Mr. *Robinson* and his firm, and added the name of his firm upon the face of the sheet of muslin which is so exhibited. That is the trade-mark which, under these circumstances, he devised for the purpose of his own trade to the market of *Rangoon*. That is not disputed, and indeed it is not capable of being disputed; but Mr. *Ward* says that, inasmuch as these things were put on his goods, he became entitled to these trade-marks. By what process? under what contract? It is said that he paid for the stamps, which was only the most ordinary course of business. Mr. *Robinson* had gratuitously, I suppose, made him the designs, but of course he was not going to engrave them. The stamps were engraved, naturally, at the expense of Mr. *Ward*, for it was for his benefit they were supplied in the first instance. Under those circumstances, Mr. *Ward* sends to Mr. *Robinson* the shirtings. They are sent by Mr. *Robinson* to the bleachers, and they become white shirtings. They are sent in that state to the *Rangoon* market. They are quoted in the price current of the *Rangoon* market as *Robinson's* shirtings, with the numbers upon them. The trade-mark established was the trade-mark of *Robinson* and not the trade-mark of *Ward*. *Ward* kept his name back. *Ward* says that that was at *Robinson's* instigation; but that is not admitted by *Robinson*. It is notorious, and it appears even on the evidence, though not very distinctly, that the manufacturer of cotton goods does not export in his own name. There is a very good reason why he does not. The merchants who buy in the English markets and sell in a foreign market would be surprised and dissatisfied if they found that the man whom they employed at *Liverpool* or *Manchester* was their competitor at *Rangoon* or *Burmah;* but I assume that Mr. *Robinson* did say, "I advise you not to put your name on the goods." The advice was accepted, and it was not fraudulent advice. There was a very good reason for it. Mr. *Robinson* puts his own name on the goods, not as the manufacturer, but as the person who has selected them, and on his implied guarantee these goods are sent into the market. Where are we to find the beginning of a claim on the part of Mr. *Ward* to any property in this

combination which Mr. *Robinson* had devised, and which Mr. *Ward* approved of? Whether it was expressed or understood only by Mr. *Robinson* that the device should be used only so long as *Ward* continued to supply him with goods, is a matter I cannot fix with any certainty, nor is it necessary I should try to do so, since on the facts I have mentioned, and which are clear upon the evidence, the design was *Robinson's*, invented by him for his own trade at *Rangoon*, although invented for the convenience, and perhaps for the benefit, of Mr. *Ward*. How did *Robinson* part with his property? [His Lordship then discussed the evidence and continued:—]

In such a state of evidence as herein exists, I am obliged to ask where does Mr. *Ward* acquire a right to these marks? They are not his marks. As between himself and *Robinson*, they do mean his goods, but they do not express to the public they are his goods. Nobody can be deceived or misled by buying these goods which have these marks to the prejudice of *Ward*. The only prejudice would be to the prejudice of *Robinson*, if he has so far betrayed the trust which purchasers placed in him on the faith of these marks, and the insertion of his very name on the goods. But that would cause no liability to *Ward*. How is Mr. *Ward* injured? In 1870 he wanted to export goods to *Burmah*. He could not do, or did not choose to do it without the assistance of a shipping merchant. He applied to *Robinson*, who agreed to do it in the manner and upon the terms mentioned. Then their business arrangements came to an end. He was in the same position as he was before. He could have employed any other shipping agent, and any other shipping agent could as well have provided a device if he thought it necessary. On what principle can Mr. *Ward* say that, now he has ceased to send goods through *Robinson* who has established this as his trade-mark, he will carry away his trade-mark and apply it to his (*Ward's*) goods? There is no pretence whatever for the claim which *Ward* makes. I think Mr. *Robinson* has established a right to the property in this trade-mark, and I think he is entitled to an injunction to restrain Mr. *Ward* from infringing by imitation or otherwise that trade-mark given in evidence here.

Then I must say that I am not at all satisfied that there was any necessity for any other suit than that which Mr. *Robinson* at

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first instituted. It is not necessary to carry that any further. I think the defence and counter-claim would have raised every question, and that the Court would have had full power to adjudicate upon the case, and I regret that the expense of a second suit has been occasioned. The good sense of the parties before me has prevented that being a very great inconvenience, because the counsel engaged have agreed that the two should be treated as one suit, and as one suit it has been treated.

An attempt was made to introduce some suggestion of custom. No doubt there is the expression in Mr. *Robinson's* answer "according to the custom," by which I suppose he means the established practice in *Manchester;* but when several gentlemen of the highest respectability are called to prove as witnesses on either side a custom, it appears there is no custom at all, and there is not even a usage. Each man does what he thinks right in each particular case. [After referring to the evidence, his Lordship continued:—] Custom, in my opinion, is out of the question. The dealings between the parties—the contract between the parties is all I have to regard. Mr. *Ward's* point was that he should have his goods exported to *Rangoon,* and that his name should not appear upon them; or, if it is said that is putting it too strongly, at least that the name of *Robinson* should appear upon them as being the exporter, and the person who, in the *Rangoon* market, and the price-current list, or in any other transaction, was held to be the man dealing in the commodities. After that, in my opinion, it is in vain for Mr. *Hemming* to maintain that which he says is necessary to his case, namely, that the property is in *Ward,* because the business carried on was *Ward's.* In my judgment, it was no more Mr. *Ward's* business than it was mine. It was Mr. *Robinson's* business in his character of exporter, not manufacturer. In the market at *Rangoon* he was not supposed to be a manufacturer, and there is an inscription there which English merchants could read and understand, and which I dare say *Rangoon* merchants could read and understand; or if they could not, would have translated to them. These goods come out with an inscription upon them, which shews that *Robinson,* the *Manchester* merchant, has selected these goods, and it is on this guarantee that purchasers are asked to spend money upon them. The

property in this stamp is distinctly proved and established to be *Robinson's*, and I think therefore he is entitled to the injunction he asks. I can only reject the claim which Mr. *Ward* makes as being the owner and proprietor of these trade-marks, and say he is not at liberty to use them.

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Ward, and *Finlay & Co.*, appealed. The appeal came on to be heard on the 10th of May, 1878.

Argument.

Hemming, Q.C., *A. L. Smith*, and *Grosvenor Woods*, for *Ward*, and *Finlay & Co*:—

The goods were *Ward's* goods, the trade his trade, and therefore the marks his trade-marks, *Robinson & Co.* being only his agents or sub-agents, and he has now a right to give *Finlay & Co.* authority to use these marks. We claim the right to use the old marks in their entirety on the ground that they were used simply to denote our goods, even though *Robinson's* name and arms formed part of them; but to avoid all question we have substituted the name and arms of the new agent for those of *Robinson*, preserving the range numbers and the general combination. The marks belong to the person who has the goodwill of the trade: *Hall* v. *Barrows* (1). *Robinson* cannot have any right to a reputation acquired by the sale of our goods. That must belong to the person to whom the goods belong; and the marks have no value except so far as they carry with them that reputation which has been the result of our trade carried on at our risk. In fact, the right to use a trade-mark means the right to assert what the trade-mark has come to mean. In this case the trade-mark asserts that the goods stamped are goods offered for sale by the same owner who has been supplying goods under that mark for several years. That assertion would be false as to the goods which *Robinson* is now sending out, but true as to *Ward's* shipments. *Ward*, therefore, is entitled to use the old mark, and *Robinson* is not. In *Makepeace* v. *Jackson* (2) it was held that the principal had a right to the benefit of an invention by the agent made in the course of the agency. There clearly was no custom,

(1) 9 Jur. (N.S.) 483; 10 Jur. (N.S.) 55; 4 D. J. & S. 150.
(2) 4 Taunt. 770.

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and as clearly no contract beyond the understanding that the marks were to be used on *Ward's* goods alone.

Argument.

Sir *H. Jackson*, Q.C., and *Bryce*, for *Robinson*:—

We say that the trade-mark was used to denote a set of goods for the quality of which *Robinson* was responsible, and *Ward* cannot have a right to use it for other goods. *Robinson* had a reputation depending on a long character in business, and if *Ward* were to send out inferior goods bearing the marks used by *Robinson*, *Robinson's* reputation would suffer.

[BRAMWELL, L.J.:—Can the parties be supposed to have intended that after *Ward* had acquired a reputation for goods exported under this mark, *Robinson* should be entitled to turn round and say that *Ward* should no longer use it?]

That is not the case which has occurred.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

When the real facts of the case are ascertained, it appears to me a reasonably clear case, and my view is not in accordance with that of the Vice-Chancellor, except that I quite agree with him that there is no evidence of any particular bargain or of any particular custom, or of any usage which will affect the rights of the parties, and I also agree with him in saying that Mr. *Ward* did not acquire any right to restrain *Robinson* from using this combination, or any colourable imitation of this combination.

The circumstances certainly are very peculiar, and the question as to the trade-mark arises under circumstances which appear to me to be entirely novel. At the time of the commencement of the relations between *Ward*, *Robinson*, and *Galbraith & Co.*, no one of the parties had a right to any trade-mark whatever as connected with cotton goods going to *Rangoon*. *Robinson & Co.* had some years before occasionally, as shipping agents, been connected with sending goods to *Rangoon*, but the particular trade in question was altogether new. *Robinson* being closely connected with the firm of *Galbraith & Co.* in *Rangoon*, was minded to get for them business which would redound to his own profit. He introduces *Ward* to *Galbraith & Co.*, or rather to Mr. *Galbraith*, a member of that firm, the result of which introduction is, that *Ward* agrees to

consign his goods to *Galbraith & Co.* in *Rangoon*, and also agrees (which seems to me to be an essential part of the arrangement) that for the protection of *Robinson*, who had a great interest in the matter, the goods should be sent through *Robinson* to *Galbraith & Co.*, that is to say, that none of the goods should go without having passed through the hands of *Robinson*, who had a great deal to do with the finishing of them, the packing of them, and the shipping of them, and as to advising them. He had important duties to discharge towards *Galbraith & Co.*, because he was to advise them about the extent to which they might advance moneys upon the goods he was sending, and he was to receive 1 per cent. commission out of the 8 per cent. commission given by *Ward* to *Galbraith & Co.* *Ward* was the owner of the goods, and was to be the consignor, and *Galbraith & Co.* were to be the consignees. The goods remained *Ward's* till they were sold, and when they were sold *Galbraith* was to return the money to *Ward*.

Under this arrangement the business was carried on for some years; the goods were *Ward's*, *Galbraith* was the consignee, and *Robinson* was the intermediate man. For the purposes of that business, and of that business only, viz., the consignment of *Ward's* goods to *Rangoon*, particular trade-marks were devised, apparently by joint consultation between all the parties, or at all events by a joint consultation between *Ward* and *Robinson;* and for the purposes of that business *Robinson's* crest, name, and coat-of-arms were taken, and a white elephant was added, being a mark which *Galbraith & Co.* had previously used for other trades. Those were the marks which the three agreed to use upon the goods in which the three were interested in the way I have stated. What, then, did those marks indicate? If anybody had asked that question he would have been told that they indicated goods either manufactured or bought by *Ward*, which passed through *Robinson's* hands (who to a certain extent was answerable for the mode in which they were finished), and were sent out to *Galbraith & Co.;* that is to say, it was a mark invented by the three for the business in which they were respectively interested. That is the only fact that we have got before us from which we are to deduce the rights of the parties. Such a mark was introduced and used, and continued to be used until the failure of *Galbraith & Co.*, when the

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transactions, as far as they were concerned, came to an end; and then, by reason of a quarrel or a difference between *Ward* and *Robinson*, *Ward* ceased to employ *Robinson*, and employed somebody else.

In my opinion, under those circumstances, it is impossible to say that either *Ward* acquired a monopoly of that trade-mark against *Robinson*, or that *Robinson* had a monopoly of it against *Ward*. Suppose *Ward* had sent out the goods for twenty years to *Rangoon* in this way, and that the goods had acquired a very great reputation in the market, such as that of the old *East India Company's* marks, that is to say, such a reputation that persons seeing these marks on goods would not think it worth while to examine either the quantity or the quality of the goods, and that then *Robinson* was minded to throw up the undertaking, or died, or transferred his business to somebody else, would *Ward* lose his right of continuing to have his goods marked in exactly the same way as they had been marked before with the consent and privity of *Robinson* himself? I cannot believe that it was the intention of the parties that such a consequence should be the result of the transactions between them.

On the other hand, suppose that after these marks had been arranged and applied, *Ward* within a short time determined to have no further connection with *Robinson*, in that case it would be equally unreasonable to suppose that *Robinson* was parting with the right to use his own crest or coat-of-arms, or name, or the combination of figures of which, at all events, he was one of the co-designers or co-inventors. The result is this: the case is not like one depending on the relation of master and servant, or principal and agent, but it is more like a partnership; that is to say, the mark was adopted by persons joined in a matter in which they were interested jointly, not as master and servant, but by way of a partnership. The *onus probandi* is thrown upon the Plaintiff in each case to prove that he has that monopoly and sole right which he alleges to use the marks or combination of marks, and that the Defendant is unlawfully using the same. Each Plaintiff has, to my mind, entirely failed to discharge that *onus*, and the result is that each action ought, in my opinion, to be dismissed with costs. But to avoid complication it will be best that both actions should

be simply dismissed, without making any order as to costs here or below.

BAGGALLAY, L.J.:—

As regards the judgment of the Vice-Chancellor granting the injunction in *Robinson* v. *Finlay*, I think it is important to bear in mind that *Robinson's* claim was only for the combination of the several portions of the design placed upon the calico and not for the individual portions, and although he claims that certain portions of the design, for instance, the crest and the shield, have been his trade-marks upon previous occasions, there is no suggestion that goods are known in *Burmah* by reason of the crest or coat-of-arms being placed upon them. The allegation is, that the goods are recognised in *Burmah* by reason of the whole design being there. Therefore we have not now to consider whether *Robinson* would have had a title in respect of the portions of the trade-mark which were his before the year 1870, or any of them, but whether he has a property in the whole design which will entitle him to have an injunction.

I think we have only to turn to the admitted facts of the case to see that it is impossible to hold that any one of the three parties interested in the adventure, for the purpose of which the design was adopted, can claim to be entitled to that design when the adventure is put an end to. We have this fact: that *Ward* shipped goods to *Burmah*, consigning them to *Galbraith & Co.* and shipping them through *Robinson & Co.* Then, in order that the goods might be known in *Burmah*, a mark was adopted composed of what I may call elements representing each of the three several parties. As regards two of the parties, there does not appear to be any question that they are represented. The crest and the stag, and the *Robinson* shield, and the words "Superior Manufacture, *George Robinson & Co., Manchester*," all represent what I may call the *Robinson* element in the design. Equally so does the white elephant ticket, which was an old design of *Galbraith* in *Burmah*, represent the *Galbraith* element; and it is suggested, but not proved, that certain figures in the design, namely, the range of figures from 000 up to 999, represent the *Ward* element. We have then a particular design for the purpose of giving a cha-

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racter to goods, in the export of which the several parties are interested, and that particular design contains something which represents the interest more or less which each of the three several parties has in the goods so exported. It may be a very good design so long as the purpose for which it was invented continues to be effectuated, but when the parties cease to carry on this particular adventure, I am at a loss to understand upon what ground it can be said that that design has become the property of any one of the three parties concerned who were using it. It appears to me, therefore, that *Robinson* has no exclusive title to this design; and it being clear upon the evidence that the designs were designs in which three persons were interested for the purpose of carrying on a business or adventure in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other, and that *Ward's* action must fail, as well as that of *Robinson*.

Bramwell, L.J. BRAMWELL, L.J.:—

I am of the same opinion. The facts really are not in dispute, but it is important to bear them clearly in mind in order to understand how the case ought to be dealt with. Mr. *Ward* was a manufacturer, and was minded to be an exporter. He accordingly arranged with *Galbraith* that he would export certain goods to *Rangoon* consigned to *Galbraith & Co.*, to be sold by them for him. The contract arising out of the consignment was wholly and entirely between *Galbraith* and *Ward*. *Robinson's* share in the matter was this: *Ward* required somebody to manage that part of the business which had to be done after the goods left his manufactory, or, if they were not his own goods, the manufactory of the person of whom he bought them. They had to be bleached and undergo a variety of operations, and all those things were to be done by Messrs. *Galbraith*. They had a house in *Glasgow*, and they were to do this, but not through the agency of their *Glasgow* house apparently, but through the agency of *Robinson*. There was no relation of any kind between *Robinson* and *Ward*. There were no circumstances under which one can imagine that *Robinson* would have had a right of action against *Ward*, or *Ward* a right of action against *Robinson*. If the bleaching or shipping, or any

other thing was not properly attended to, *Ward's* remedy would have been against *Galbraith*, and *Galbraith's* remedy would have been over against *Robinson*. It seems to me, with very great respect to the Vice-Chancellor, that he has not thoroughly appreciated this point, but has supposed that *Robinson* was in some way principal exporter of these goods, which to my mind he most clearly was not. *Robinson* did not export. The thing was not done at his risk. It was no venture of his, and he gained no profit out of it except the 1 per cent. which *Galbraith* was to pay to him. The claim of Mr. *Robinson* to the trade-mark is to my mind the strangest claim to a trade-mark that ever was heard of. It comes really to this: "I am a shipping agent, I am not a manufacturer, I am not a merchant adventurer, I am not a person who has selected or chosen these goods, and who has sent them out at my risk, and for my profit, or for my loss." All he says is, "I am the commission agent, or commission merchant, if the word commission agent is not an acceptable one, through whom the exporter, who is doing it at his risk and for his profit, is exporting these goods." It seems to me that such a person as that exercises no judgment upon the matter at all. He gives no character to the goods in any way, and with great submission to the learned Vice-Chancellor, I doubt very much whether he was correct in thinking that *Robinson's* mark shewed that he had exercised his judgment on the goods. I doubt whether Mr. *Robinson* had a right to say, "I will not send this particular parcel of goods out because I do not like them." The answer would have been, "What voice have you in the matter?" It seems to me that this is in no way a trade-mark. It seems to me it is very little more of a trade-mark than if upon goods always going out by the *Peninsular and Oriental Company's* steamers there was stamped outside of the bale "*P. & O.*"

It seems to me, therefore, with great submission to the learned Vice-Chancellor, that what I cannot help calling the error is in supposing that this is *Robinson's* business, in which *Robinson's* character is in any way pledged, and in which the mark is an indication of some responsibility on the part of *Robinson*. Nothing of that sort, to my mind, exists. But, supposing that it were so, is *Ward* deprived of the right to use a distinctive trade-mark such

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as that which he is now claiming? It seems to me to be strange to say that he is. The goods are mainly of his own manufacture, but if they are not all his manufacture, they are of his manufacture or selection, and he sends them out for his own profit or loss. He is the merchant adventurer. They had a particular trade-mark upon them lawfully at the time; they go out and they are sold possibly for twenty years, and gain a reputation, because the trade-mark is known as an indication either that the goods are of the same manufacture, or that they have been selected by the same person who has selected and arranged and sent out on his own risk that form of goods with that trade-mark upon them. Suppose Mr. *Robinson* had retired from business, or ceased to act with *Galbraith*, could he have put an end to the use of the trade-mark by Mr. *Ward?* I think it is impossible that he could. It was suggested in the argument what would be the case if Messrs. *Gilbey* sold wine for a considerable time for a particular person, could he use their trade-mark? I think the answer is a tolerably obvious one. If they sold their wine without reference, as I think they do, to its having been grown by any particular person, the wine of that particular person would have gained no particular reputation as being sold by Messrs. *Gilbey*, and he would not be entitled in any way to use their trade-mark; but, supposing *Gilbeys* were unwise enough to sell a particular wine and earmark it in some way, applying a particular trade-mark to it, and describing it in such a way that that portion of their sales got a special renown independently of Messrs. *Gilbey* themselves, and they chose to sell it no longer, I should doubt very much whether the grower of the wine would not be entitled to use all the marks which had designated those wines with their trade-mark over it. It seems to me that the proper conclusion in this case is that *Ward* has a right to use the marks.

Then with respect to the other question, as to whether *Ward* is entitled to prevent Messrs. *Robinson* from using the trade-mark which they use, I feel considerable difficulty, but I think that he is not, and pretty much for the same reasons for which I think that *Robinson* cannot prevent his using it. I cannot think that when this arrangement was come to *Robinson* for ever gave up the use of his own coat-of-arms, and his own crest, and of

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the white elephant used before, more especially when I remember that when this trade-mark was first used by Mr. *Ward* it was used in conjunction with *Robinson's* name. It seems to me, therefore, that the right way to look at the two cases upon the whole is this, that here was a compound matter which the parties agreed to, and upon coming to the arrangement which they did come to, they made no provision as to what should happen when that arrangement ceased to exist between them, and the consequence is that each party must stand upon what one may call his natural rights under the circumstances, that is to say, that each may do what he is not forbidden to do.

Solicitors: *Milne, Riddle, & Mellor; Johnsons, Upton, & Co.*

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[1876 N. 30.]

C. A. 1877 FRY, J. *July* 19, 20, 21, 23. C. A. 1878 *July* 16, 20, 23, 26, 29.

Negligence—Damage—Injunction—Act of God—Extraordinary Flood—Overflow of Water from Dock—Company—Statutory Powers—Failure to fulfil Statutory Obligation—Apportionment of Damage.

In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God.

Where a Defendant charged with negligence has been guilty of a breach of duty sufficient to produce the damage complained of, he cannot escape liability by shewing that the same damage would have arisen from some other cause beyond his control if he had done his duty. But if he can shew that some of the damage which actually happened arose from a cause beyond his control, the liability for damage will be apportioned.

A dock company were authorized by their special Act to make and maintain a dock and works connected therewith according to the levels defined in certain plans and sections deposited with the clerk of the peace. The dock communicated with the River *Thames* by an artificial channel, through which the water was admitted. The sections shewed the retaining bank of the dock and channel at an uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water

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mark, the river being kept from overflowing by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide took place, and the river rose to 4 ft. 5 in. above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above 3 ft. 4 in., and the water had never overflowed from the dock:—

Held, first, on the construction of the Act, that the company were bound to keep their bank up to the level of four feet above Trinity high-water mark, and were liable to the Plaintiffs for breach of their statutory duty in not doing so:

Secondly, that, independently of the Act, the Defendants were bound as riparian owners to keep the bank up to the level of 4 ft. 2 in., the height of the rest of the river wall, and that they were liable to the Plaintiffs for negligence in not doing so:

Thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the Defendants from their liability; but that they ought to have an opportunity of shewing that the damage done by the act of God and the damage done through their negligence ought to be apportioned.

The decision of *Fry*, J., affirmed with a variation.

Statement.

THIS was an action to recover damages for an injury caused to the Plaintiffs' works and property by an overflow of water from the Defendants' dock, which, as the Plaintiffs alleged, resulted from the Defendants' negligence in not having maintained the retaining wall of their dock, called the *Victoria Dock*, at a sufficient height.

The Plaintiffs were the owners of a manufactory for chemical manures, situate at *Plaistow*, in *Essex*. The Defendants were the owners of the *Victoria Dock*, which nearly adjoined the premises of the Plaintiffs. The dock was approached from the river by a narrow artificial channel and an artificial tidal basin, through which the water was admitted into the dock. The entrance gates of the channel were so constructed as to admit and retain the water of the river, and as the tide rose the water flowed from the river through the channel into the tidal basin. The natural level of the land on which the Plaintiffs' premises were situate and on which the Defendants' dock was constructed was some seven or eight feet below Trinity high-water mark, and the water of the river was kept from

overflowing the whole of the district by means of a river wall. The district was subject to the jurisdiction of the *Dagenham* and *Havering* Commissioners, who, prior to November, 1875, required the owners of land fronting the river to maintain the river wall at a height of 4 ft. 2 in. above Trinity high-water mark. On the 20th of March, 1874, there was a very high tide in the river *Thames*. The water then rose at *London Bridge* to a height of 4 ft. 3½ in. above Trinity high-water mark. This was the highest tide which had been up to that time recorded in the river. The highest tide previously recorded since the year 1852 was in March, 1869, when the water rose 3 ft. 7 in. above Trinity high-water mark at *London Bridge*. On the 20th of March, 1874, a small quantity of water overflowed the retaining bank of the Defendants' entrance channel and basin and found its way into the Plaintiffs' premises. The Plaintiffs then gave notice to the Defendants that they should hold them liable for the damage thus caused. The Defendants, however, repudiated their liability, and no steps were taken to enforce the claim. In April, 1874, when another high tide was anticipated, the Defendants placed some clay on the top of their bank, but this was only a temporary addition to its height, and was not maintained afterwards. No tide of equal height occurred again, and no further overflow of water from the Defendants' channel or basin took place before November, 1875. Early in the morning (about 2.30 A.M.) of the 15th of November, 1875, there was again an extraordinarily high tide in the *Thames*. The water then rose at *London Bridge* to a height of 4 ft. 6 in. above Trinity high-water mark. It rose to 4 ft. 5 in. at the *Victoria Dock*, and there was a general overflow of the river in that district. A large quantity of water found its way into the Plaintiffs' premises and caused considerable damage to their works and stock-in-trade. This water, as the Plaintiffs alleged, was water which overflowed the bank of the Defendants' entrance channel and tidal basin at the same place where the overflow had occurred in March, 1874. The Plaintiffs alleged that the Defendants were liable for negligence in not keeping their bank at a proper height so as to prevent the overflow of the water at high tides, and they claimed damages to the amount of £7000, and an injunction to restrain the Defendants from permitting any further overflow of water into the Plaintiffs' premises.

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Statement.

By their statement of defence the Defendants denied that the water which had caused the damage to the Plaintiffs had come from their premises. They also denied their liability if the water had come from their premises. They asserted that they had not been guilty of any negligence, and in particular that the high tide of the 15th of November, 1875, was an act of God, against which they were not bound in any case to protect the Plaintiffs.

The *Victoria Dock* was constructed by a company called the *Victoria* (*London*) *Dock Company*, which was incorporated under that name by an Act (13 & 14 Vict. c. li.) passed in 1850. By the *Victoria* (*London*) *Docks Act*, 1853 (16 & 17 Vict. c. cxxxi.), the Act of 1850 was repealed, but (by sect. 4) it was provided that, notwithstanding the repeal, the company should for the purposes of the Act remain as from the passing of the Act of 1850, and continue incorporated by the name of *The Victoria* (*London*) *Dock Company*, "with power to make and maintain docks and works, with all proper works and conveniences connected therewith, and to purchase, take, hold, and dispose of lands and other property for the purposes and within the restrictions of this Act and of the Acts incorporated herewith." By sect. 3 the *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Harbours, Docks, and Piers Clauses Act*, 1847, were incorporated with the special Act. Sect. 22 provided as follows: "And whereas a plan and sections of the dock authorized to be made by the said recited Act, and therein described as the intended dock, and of the works connected therewith, shewing the situation and levels thereof respectively, and the limits within which the same are to be constructed, and also a book of reference containing the names of the owners, lessees, and occupiers of the lands upon or through which the same are intended to be made, were previously to the passing of the said Act, and in the month of November, 1849, deposited with the respective clerks of the peace for the counties of *Essex* and *Kent*: Be it enacted, that, subject to the provisions in this and the said incorporated Acts contained, and to the powers of deviation, alteration, and enlargement herein and in the said incorporated Acts contained, it shall be lawful for the said company to continue, make, complete, and maintain the said dock and the works which were authorized by the said Act hereby repealed in the situation and upon the lands delineated upon the said plans

and contained in the said book of reference, and according to the levels defined on the said sections." Sect. 23 empowered the company, subject to the provisions of the special Act and of the Acts incorporated therewith, to alter, vary, and enlarge the dock and works authorized by the Act of 1850, and to make and maintain additional docks and other works connected therewith; and sect. 24 provided: "Whereas plans and sections of the additional docks, enlargements, alterations, and works herein authorized to be made, and also books of reference to such plans, containing the names of the owners or reputed owners, lessees or reputed lessees and occupiers of the lands in, upon, or through which the same works are intended to pass or be made, have been deposited with the clerks of the peace for the counties of *Essex* and *Kent:* Therefore, subject to the provisions in this and the said incorporated Acts, and to the powers of deviation in this Act contained, it shall be lawful for the company to make or maintain the said additional docks, enlargements, alterations, and other works upon the lands delineated on the said plans and described in the said book of reference, and according to the levels defined on the sections."

The deposited sections (though their effect was the subject of conflicting evidence) shewed, in the opinion of the Court, the retaining bank of the entrance channel and tidal basin at an uniform level of four feet above Trinity high-water mark. The dock and works were completed in 1855.

By the *London and St. Katharine Docks Act*, 1864 (27 & 28 Vict. c. clxxviii.), the *London Dock Company* and the *St. Katharine Dock Company* were amalgamated into one company by the name of *The London and St. Katharine Docks Company*, and the transfer to that company and the amalgamation with their undertaking and docks of the undertaking and docks of the *Victoria* (*London*) *Dock Company* were authorized. Sect. 57 confirmed several agreements for this transfer and amalgamation which had been previously entered into between the *Victoria Company* and the *London and St. Katharine Companies.* Sect. 58 enacted that the transfer and amalgamation should take place in accordance with those agreements. Sect. 59 provided that "the *Victoria Docks*, by this Act transferred to and vested in the amalgamated company, are so transferred to and vested in them subject to the payment, satisfaction, or discharge by the amalgamated company of the

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whole of the debts, liabilities, and engagements of the *Victoria Company* as they shall be and exist on the transfer and amalgamation taking effect, and subject also to the several statutory obligations relating to the *Victoria Docks* which appear by the several sections and provisions of the recited Acts relating to the *Victoria Dock Company*, which are set forth in part 3 of the 4th schedule to this Act annexed, and the amalgamated company's obligations under this Act with respect to the *Victoria Docks*." By sect. 60: "From and after the transfer and amalgamation, and except only as is by this Act otherwise provided, the amalgamated company shall with respect to the *Victoria Docks* and all matters connected therewith represent the *Victoria Dock Company* as if that company and the amalgamated company had originally been, and had continued without intermission to be, one and the same body corporate." Sect. 61 provided that, on the transfer and amalgamation taking effect, the *Victoria (London) Docks Act*, 1853, should be repealed, but sect. 62 provided that, notwithstanding that repeal, the several sections and provisions of that Act which were set forth in part 3 of the 4th schedule to the amalgamating Act should, so far as the same were at the time of the transfer and amalgamation in force, remain in full force. The sections of the Act of 1853 which are above referred to were not included in the 4th schedule to the amalgamating Act. Sect. 64, however, provided that, notwithstanding the repeal of the Act of 1853 and other Acts relating to the *Victoria Dock Company*, "everything before the repeal thereof done, suffered, and confirmed under or by any of those Acts shall be as valid as if the repeal thereof had not happened, and the repeal thereof and the operation of this Act respectively shall accordingly be subject and without prejudice to any and everything so done, suffered, and confirmed respectively, and to all rights, liabilities, claims and demands, both present and future, which, if the repeal had not happened, would be incident to or consequent on any and every thing so done, suffered, and confirmed respectively; and with respect to all such things so done, suffered, and confirmed respectively, and all such rights, liabilities, claims and demands, the amalgamated company shall to all intents represent the *Victoria Dock Company*, provided that the generality of this provision shall not be restricted by any of the other provisions of this Act." And by sect. 67, "Notwithstanding

the repeal of those Acts, all plans and books of reference . . . respectively deposited for the purposes of any of those Acts with any clerk of the peace, shall remain in his custody as if they were deposited for the purposes of this Act." Sect. 92 provided that "The amalgamated company shall maintain, manage, regulate, work, and use the *London Docks* and the *St. Katharine Docks* respectively, subject to all statutory duties, obligations, and liabilities to which the *London Dock Company* and the *St. Katharine Dock Company* and the *Victoria Dock Company*, and their lessees respectively, immediately before the passing of this Act were, or but for this Act would be, subject in respect of the *London and St. Katharine Docks* and *Victoria Docks* respectively."

The action came on for trial before Mr. Justice *Fry* on the 19th of July, 1877.

The evidence proved, in the opinion of the Court, that the water which caused the damage to the Plaintiffs came from the Defendants' dock, and that the Defendants' retaining bank was, on the 15th of November, 1875, for some distance from six to ten inches below the height of four feet above Trinity high-water mark.

It was also proved that, with the exception of the overflow in March, 1874, the water had never overflowed the Defendants' retaining wall from the time when it was first constructed until November, 1875. Mr. *C. J. More*, the assistant engineer to the *Thames* Conservancy Board, proved, from a register of tides kept by them at *London Bridge*, that, commencing with the year 1868, the tides there exceeding three feet above Trinity high-water mark were as follows:—

8th February, 1868	3 ft. 5 in.
1st March, 1869	3 ft. 7 in.
3rd November, 1869	3 ft. 1½ in.
27th February, 1873	3 ft. 6 in.
20th March, 1874	4 ft. 3½ in.
15th November, 1875	4 ft. 6 in.
2nd January, 1877 (morning). .	3 ft. 8 in.
„ „ (evening). .	3 ft. 11½ in.
31st January, 1877	3 ft. 4 in.

It was also proved that the tides at the *Victoria Dock* were

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generally from two to eight inches lower than those at *London Bridge*, and that the rise of the water is much slower at the latter part than at the earlier part of the rise. The openings in the walls of the embankments on the north and south sides of the *Thames*, constructed by the Metropolitan Board of Works, were originally required to be constructed at a level of four feet above Trinity high-water mark, but after the tide of November, 1875, sills six inches high were placed in those openings. After that tide, also, the *Dagenham* and *Havering* Commissioners required the frontagers in their district to raise the river wall to five feet above Trinity high-water mark.

Argument.

Sir *Henry James*, Q.C., *Chitty*, Q.C., *North*, Q.C., and *Rigby*, for the Plaintiffs :—

The Defendants were bound by their private Acts to keep their bank at any rate as high as four feet above Trinity high-water mark. That is clear from the deposited plans and sections. The Defendants are subject to all the liabilities of the original *Victoria Dock Company : Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (1).

But the Defendants were bound to do more than that. They were bound to take proper precautions to prevent any overflow which might result from any tide which might reasonably have been expected. This tide of November, 1875, was only a few inches higher than that of March, 1874. That tide should have operated as a warning, and should have led the Defendants to expect even higher tides. It cannot be said that the tide of November, 1875, was an act of God in the legal sense of the term. It was not so unprecedented that it can be said that it could not reasonably have been anticipated. The Defendants brought the water there for their own purposes, and must keep it in at their peril : *Rylands* v. *Fletcher* (2). They may be excused if mischief results from the act of God : *Nichols* v. *Marsland* (3). But in the present case there is no such excuse. A tide three inches higher than a previous one cannot be called an act of God. If an extraordinary flood happens once, the Defendants are bound to provide

(1) 4 Ch. D. 845. (2) Law Rep. 3 H. L. 330, 339.
(3) Law Rep. 10 Ex. 255 ; 2 Ex. D. 1.

against such a flood for the future. These very high tides happen very seldom, but it may be assumed that what has once happened may happen again. This is not the case of a great tidal wave like that which rose on the occasion of the earthquake of *Lisbon*, but a small increase of three inches above the tide of March, 1874.

[FRY, J., referred to *Rex* v. *Commissioners of Sewers for the Western Division of the County of Somerset* (1).]

But, even if this tide can be properly called an act of God, the Defendants cannot avail themselves of that excuse. They have not kept up their bank to the height which their Act prescribed, and it is a condition precedent to their pleading the act of God that they should themselves have done all that they were bound to do. At any rate, they are bound to shew that if their bank had been kept up to four feet we should have been damaged to the same extent as we have been. This it is impossible for them to do. If they had kept the bank up to four feet a much less quantity of water would have flowed over, and it would not have begun to flow over so soon. There would have been a much longer time for us to make preparations for keeping the water out.

Persons who have parliamentary powers must still use ordinary precautions: *Vaughan* v. *Taff Vale Railway Company* (2).

[FRY, J., referred to *Rex* v. *Pease* (3).]

In *Jones* v. *Festiniog Railway Company* (4) the Defendants were held liable for damage done by fire from their locomotive engine, because they had no express statutory power to use locomotive engines, although there was no negligence on their part. And in *Lawrence* v. *Great Northern Railway Company* (5) the Defendant company were held liable for not having done something more than they were expressly required by their Act to do. Here the Defendants have not done what their Act required them to do, they have not kept up their bank to four feet, therefore they are liable. They have not complied with the condition precedent imposed by the Act, and they cannot therefore avail themselves of

(1) 8 T. R. 312.
(2) 5 H. & N. 679.
(3) 4 B. & Ad. 30.
(4) Law Rep. 3 Q. B. 733.
(5) 16 Q. B. 643.

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the defence that the Act empowered them to make the dock. They are thrown back on their common law liability, and *Rylands* v. *Fletcher* (1) applies; and they cannot avail themselves of the defence that the extraordinary tide was an act of God, because they have not fulfilled their statutory obligation.

Benjamin, Q.C., *Murphy*, Q.C., *Davey*, Q.C., and *Crossley*, for the Defendants:—

The question is whether, assuming that there has been negligence on the part of the Defendants, there is any legal principle by virtue of which they are liable for that negligence when, if they had taken the precautions they ought to have taken, those precautions would, by reason of an act of God, have been unavailing to prevent the damage?

At common law a "frontager," or owner of land abutting on the sea or a river, is under no obligation to keep up a sea or river wall for the benefit of his neighbour: *Hudson* v. *Tabor* (2). This shews that the Plaintiffs ought to have taken reasonable care to protect themselves. Then, again (except in the case of contract), a man is only responsible for his own negligence and the result of it; not for the act of God or its results. So far as the damage in the present case resulted from the act of God, we are not responsible for it. If we had taken reasonable precautions there would still have been an overflow; we cannot be responsible for that, and equal damage would have resulted to the Plaintiffs. The act of God was the proximate cause of the damage, and we are not responsible for that. There never was any overflow from our dock before March, 1874, and it could not have been reasonably anticipated that such a high tide as that would recur. The act of God begins at that point in the operation of natural causes when that happens which goes beyond what any reasonable or prudent man might have anticipated. *Nichols* v. *Marsland* (3) is an illustration of this.

If we are liable at all, we can only be held liable for so much of the damage as has been occasioned by our fault. In *Workman* v. *Great Northern Railway Company* (4), the Court distinguished

(1) Law Rep. 3 H. L. 330.
(2) 1 Q. B. D. 225; 2 Q. B. D. 290.
(3) Law Rep. 10 Ex. 255; 2 Ex. D. 1.
(4) 32 L. J. (Q.B.) 279.

between the damage which resulted from the Defendants' negligence, and that which would have resulted if they had performed their obligation, and only held them liable for the former. In consequence of the Defendants' embankment the Plaintiff's land, which would have been flooded to a certain extent if the embankment had not existed, was flooded to a greater extent, and it was held that the Defendants were liable only for the difference between the amount of damage actually done to the Plaintiff and that which would have been done if there had been no embankment. The damages were apportioned on the principle that the Defendants were liable only for the damage which directly resulted from their negligence, and not for that which was due to other causes operating at the same time. It is true that there was no act of God in that case, but it recognises the apportionment of the damages, and shews that, however difficult it may be to distribute the damage, the Defendant cannot be charged with the damage due to other causes than his negligence, such as the act of God.

[FRY, J.:—In *Keighley's Case* (1), and in all the other reported cases, so far as I know, in which the act of God has been admitted as an excuse, the Defendant had himself done all that he was bound to do.]

No doubt that would generally be so, and the present case raises a new point. But the principle is this—a man is liable only for the consequence of his own negligence, and not for the injuries resulting from another cause operating at the same time. There is no condition precedent that he who pleads the act of God shall not have been guilty of any negligence himself. If it is impossible to distribute the damages, the Defendants ought not to be held liable at all. In *Smith* v. *Fletcher* (2) the Court took a distinction between water flowing into the Plaintiffs' mine naturally and water brought there by the act of the Defendants.

The high tide of November, 1875, was an act of God. Because an extraordinary event has happened once, it does not follow that if it recurs it is not then equally an act of God. Unless it has happened several times it cannot reasonably be expected to recur. No such tide as that of March, 1874, had ever been known before;

(1) 10 Rep. 139 a. (2) Law Rep. 7 Ex. 305; ibid. 9 Ex. 64.

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none like it happened for many months afterwards, and the Defendants had a right to assume that it would not recur, and were not bound to provide against it, especially considering that no damage worth speaking of was done to the Plaintiffs in March, 1874. And, though it is shewn that the tides at *London Bridge* rise several inches higher than at our docks, the level of the openings in the *Thames Embankment* between *Westminster* and *Blackfriars Bridges* was, prior to 1874, fixed by the most competent engineers at four feet above Trinity high-water mark. Since November, 1875, they have placed sills six inches deep in the openings. And in the same way the *Dagenham* Commissioners have, since November, 1875, required the river wall protecting their district to be raised to five feet. The right conclusion is that the tide of November, 1875, could not have been reasonably anticipated, in other words, that it was an act of God in the legal sense of the words.

Moreover, the evidence shews that there was a general overflow of the river in this district, a common public calamity. It is impossible to distinguish between the water which came from us to the Plaintiffs and that which came to them from other sources, and for this reason also we ought not to be held liable in damages: *St. Helen's Smelting Company* v. *Tipping* (1).

On the construction of their Acts of Parliament there is no obligation upon the Defendants to keep their bank up to an uniform level of four feet, and never for a moment to allow it to become any lower. The Act certainly does not impose any such liability in express terms, and even if the deposited plans and sections are to be imported, they do not shew any such level as four feet. The Plaintiffs' own skilled witnesses differ as to the meaning of the sections. At any rate, there is no hard and fast level of four feet for the entire extent of the dock. The only obligation is to do what is reasonable. The doctrine of *Rylands* v. *Fletcher* (2) does not apply, because we are acting under parliamentary powers. We are only bound to take reasonable precautions, and the experience of years shews that we have done this. Such a tide as that of November, 1875, could not reasonably have been anticipated.

(1) 11 H. L. C. 642. (2) Law Rep. 3 H. L. 330, 339.

FRY, J., after stating the facts of the case, and his conclusion upon the evidence that the damage caused to the Plaintiffs' premises was caused exclusively by water which came from the Defendants' docks, and that on the 15th of November, 1875, the crown of the Defendants' retaining bank was to a very serious extent below four feet above Trinity high-water mark, continued :—

Now that being the state of things, this question arises, Was there or was there not negligence on the part of the Defendants? The facts which bear upon that question are shortly these: Before November, 1875, the *Dagenham* and *Havering* Commissioners required the river wall of the *Thames* to be maintained at a level of 4 ft. 2 in. above Trinity high-water mark. The openings in the walls of the *Thames* embankments were originally required to be constructed at a height of four feet above Trinity high-water mark. That would rather imply that the Defendants were negligent in leaving their bank below four feet. But against that I am bound to set this fact, that from the end of the year 1855, when their docks were opened, down to March, 1874, not a drop of water had ever passed over their bank. I should therefore have had great difficulty in coming to the conclusion that there was any common law liability for negligence on the part of the Defendants, subject, however, to the question whether the fact that water did flow over the bank in March, 1874, created such a liability. It has been argued for the Plaintiffs that that fact was in effect notice to the Defendants that they might expect a tide as high as four feet to happen again, although such an event had never been known to have happened in the history of the world before March, 1874; and it is said that, after the tide had once reached four feet, a tide which reached that height again could never be said to be so unusual or unexpected as to be deemed an act of God in the legal sense of the words. I do not think that view is correct. I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule it is not, in my opinion, necessary that

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it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice *Mellish* in the recent case of *Nichols* v. *Marsland* (1). He says, speaking of the flood which had occurred there, "The jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God." Pausing there, it may be observed, that to say that a thing could not reasonably have been anticipated is to say that it is the act of God. He then proceeds: "However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the Defendant might not have made out that she was free from fault." Therefore, I think that, if the case had stood simply on the common law liability of the Defendants for negligence, I should have had great difficulty in concluding that there was any such liability, the flood of November, 1875, being, in my judgment, what, in the contemplation of law, is called an act of God.

But I do not think that this case is to be determined upon the Defendants' common law liability, and for this reason: The Defendants did not choose to rely on their common law right to use their land as they might think fit. They chose to go to Parliament for powers to authorize them to some extent apparently to do what they might have done without those powers. They take a power to construct and to maintain a dock upon their land, and, taking that power and acting upon it, they must, in my judgment, subject themselves to the conditions which Parliament has imposed upon the exercise of that power. They cannot afterwards fall back upon the question of what was reasonable care, if Parliament have in any particular respect laid down what they are to do. The question, therefore, which I have to determine comes, in my opinion, to this, Have Parliament laid down anything which takes

(1) 2 Ex. D. 5.

the place of the common law liability to use reasonable care? have they, in short, defined the height at which the bank of the dock is to be maintained? If they have, I do not think that the Defendants can say, We will be judged by our own common law liability or by our statutory liability, as we may think fit. To allow them to do so would obviously be unfair, for this reason, that if they perform their statutory obligation they are harmless in all cases, even if that liability is less than the common law liability; whereas, if they perform even less than the statutory obligation, they might contend that, if the common law obligation reached to a less extent, they would be harmless also. I think they must stand or fall by their statutory liability. In some cases this will enure to their benefit, in other cases it will enure to their injury. But, whether it be for or against them, it becomes, in my opinion, the rule by which their negligence or care is to be tried. I therefore turn to the Act of 1853. [His Lordship referred to the provisions of the Act and to the deposited plans and sections, and continued:—]

I hold, therefore, that the statute imposed on the Defendant company an obligation to maintain the upper surface of the bank which was to retain the water in their dock at a level of four feet above Trinity high-water mark. It is conceded that they did not so maintain it. The result, in my opinion, is, that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence.

But then it is said, "That may be so as to part of the overflow, but on the morning of the 15th of November the water rose five inches above the four feet, and we claim the benefit of the provisions of the statute, and say that we are not liable for that five inches, and for aught that appears, that five inches would have done as much damage to the Plaintiffs as the eight or ten inches, which flowed over by reason of our bank being below the level of four feet." It must be borne in mind that I cannot ascertain precisely what the actual depth of the water which rose over the Defendants' bank was, though I have no doubt in my own mind, from the evidence before me, that, of the entire depth of water which passed over the Defendants' bank, by far the greater portion passed over before the four feet was reached by the tidal water.

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The Defendants say, "We are exonerated from the five inches of rise above the four feet." How do the Plaintiffs meet that? They say, "You are relying upon the act of God, and no man who has a duty cast upon him, and who does not perform that duty, can rely upon the act of God as any excuse at all. It is a condition precedent to pleading the act of God, or getting the benefit of the act of God, that you who seek the benefit of it shall have done everything which it is your duty to do." Now there is, as it seems to me, great force in that contention, and for this reason, that, if the Defendants had done their duty, the exact experiment would have been tried which was requisite in order to see what damage would have followed to the Plaintiffs from the act of God. Whereas the Defendants, by not doing their duty, have, if they are right, compelled the Court to try a much more difficult question, viz., what would have been the result of the experiment which they did not choose to try. In the one case the question would have been, What has actually happened? in the other case it is, What would have happened in a state of circumstances different from that which actually existed? and I need hardly say that the second is a much more difficult question to answer than the first.

Furthermore, there is, as it seems to me, much authority in favour of the Plaintiffs' view. Going back to *Keighley's Case* (1), where it was held that a rate might be made upon the whole of a district for the purpose of repairing a sea-wall which the frontager was liable to repair, it is put in this way, that "if one who is bound by prescription to repair a wall *contra fluxum maris*, and he keeps the wall in good repair, and of such height, and as sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the walls are broken, or the water overflows the walls," then a rate may be made on the whole district for the repair of the wall:—that is to say, that, if the person who is under the obligation does his duty and there is nevertheless an act of God which destroys the wall, he is not liable. And again, in *Nicholls* v. *Marsland* (2), the question was put to the jury whether there had or had not in fact been negligence on the part of the Defendants. It seems to me that that would have been

(1) 10 Rep. 139 a. (2) 2 Ex. D. 1.

an improper question to put to the jury if it had been sufficient for the Defendant to say, "Whether I did or did not do my duty I can rely on the act of God."

However, it does not appear to me necessary to decide this point, because I am clear that a Defendant cannot avail himself of the act of God as an excuse when he has not done his own duty, except in cases in which he can make it apparent and plain to the Court that, if he had done his duty, damage would still have followed to the Plaintiffs. Now that burthen the Defendants have, in my opinion, not discharged in the present case. I cannot tell what the effect of the water was before the tide reached four feet, except that I do know that it is in the nature of running water to make a way for itself, and, beginning therefore to flow, it would cut its own channel and keep that channel open as long as there was any supply of water. I cannot tell how far the means which were at the disposal of the Plaintiffs would have been sufficient to keep out the five inches of water above four feet, if it had ever reached their premises. I cannot tell whether it would have reached their premises. Furthermore, it is to be borne in mind that the evidence before me is distinct that, during the last two or three inches of rise of the tide, the rise would have been much more slow and gradual than during the earlier portion of the flow. Moreover, the flow would have begun at a much later period of the night, and the gangs of men in the Plaintiffs' service were coming in during that time, so that the Plaintiffs might have been in a much better condition to meet the smaller influx of water. Therefore, having attended to the best of my ability to the evidence, I cannot say that the Defendants have convinced me that, if they had done their duty, any damage whatever would have accrued to the Plaintiffs. The case, therefore, is one in which, in my opinion, negligence is brought home to the Defendants, in which I cannot tell whether any portion of the damage did or did not result from the act of God, in which the Defendants have prevented me from telling what the effect of the act of God would have been if they had done their duty, and in which I cannot distribute the total amount of damage between their negligence and the act of God further than by saying that they have not convinced me that any portion of the damage which has accrued would have accrued if

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they had done what they ought to have done. I hold, therefore, that the Plaintiffs are entitled to damages.

It is not disputed that the measure of damages will be such a sum as is requisite to restore the property of the Plaintiffs to the condition in which it was immediately before the flood. Therefore the judgment which I propose to give is this—to declare that the Defendants are liable to pay to the Plaintiffs the damage which resulted from the inundation of the Plaintiffs' works on the morning of the 15th of November, 1875, and that the amount necessary to restore the buildings and property of the Plaintiffs to the condition in which they were immediately before the inundation is the true measure of damages. Then to refer it to the Chief Clerk to ascertain the amount and to direct the Defendants to pay the amount certified within a fixed time after the certificate. Then there will be an injunction to restrain the Defendants from permitting the banks of their *Victoria Dock*, and the tidal basin and entrance channel connected therewith, to remain at a level lower than four feet above the Trinity high-water mark, so as thereby to cause any future overflow of water from their dock, basin, or channel, or any of them, into the lands and works of the Plaintiffs. And of course the Defendants must pay the costs of the action.

C. A. From this decision the Defendants appealed. The appeal came on to be heard on the 16th of July, 1878.

Argument. *Southgate*, Q.C., *Benjamin*, Q.C., *Murphy*, Q.C., and *Crossley*, appeared for the Appellants.

Sir *Henry James*, Q.C., *Meadows White*, Q.C., *North*, Q.C., and *Rigby*, for the Plaintiffs.

Southgate, in reply.

The following cases were cited: *Rylands* v. *Fletcher* (1); *Nichols* v. *Marsland* (2); *Withers* v. *North Kent Railway Company* (3); *Paradine* v. *Jane* (4); *River Weir Commissioners* v. *Adamson* (5);

(1) Law Rep. 3 H. L. 330.
(2) 2 Ex. D. 1.
(3) 27 L. J. (Ex.) 417.
(4) Alleyn, 26.
(5) 1 Q. B. D. 546; 2 App. Cas. 743.

Workman v. *Great Northern Railway Company* (1); *Smith* v. *Fletcher* (2); *Hudson* v. *Tabor* (3); *Attorney-General* v. *Tewkesbury and Great Malvern Railway Company* (4); *Reg.* v. *York and North Midland Railway Company* (5); *Davis* v. *Garrett* (6); *Biscoe* v. *Great Eastern Railway Company* (7); *Coe* v. *Wise* (8).

At the conclusion of the argument,

JAMES, L.J., said:—

We are all of opinion that Mr. Justice *Fry's* judgment must be affirmed, with a variation omitting the declaration that the whole of the damage was due to the wrongful act of the Defendants, and that they were liable to make good the whole of it. But as some important questions are involved, on which we wish to give an opinion, we will take time before we state the grounds on which we proceed.

1878. Aug. 7. JAMES, L.J., this day delivered the judgment of the Court (*James*, *Brett*, and *Cotton*, L.JJ.), as follows:— Judgment, C.A.

We intimated at the close of the arguments that the judgment of the learned Judge from whom this appeal is brought would be affirmed with a variation not substantially affecting the merits of the appeal, and not, therefore, affecting the rights of the Respondents to the costs of the appeal, which will be given to them.

The works of the Plaintiffs were inundated by a high tide which came over a low part of the retaining banks of a channel leading to the docks of the Defendants, and the learned Judge arrived at the conclusion that the inundation of the Plaintiffs' works was due to the neglect and default of the Defendants in not having maintained a proper and sufficient barrier against the influx of the tidal flood.

A great deal of the argument before the Court below and in this Court turned upon the question whether there was any statutory

(1) 32 L. J. (Q.B.) 279.
(2) Law Rep. 9 Ex. 64.
(3) 2 Q. B. D. 290.
(4) 1 D. J. & S. 433.
(5) 1 E. & B. 178.
(6) 6 Bing. 716.
(7) Law Rep. 16 Eq. 636.
(8) Ibid. 1 Q. B. 711.

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obligation to make and maintain the banks at any prescribed height. The Acts of Parliament under which the docks were constructed referred to certain deposited plans and sections shewing the position and levels of the works authorized to be made. The first Act referred to them as the plans according to which it was intended to construct the docks and other works, but did not contain any express enactment that they should be made accordingly; but the company having occasion to go again to Parliament, the omission (if it were practically an omission) was remedied by an express enactment in the second Act (22nd section), that it should be lawful for the company to continue, make, complete, and maintain the dock and works in the situation and upon the lands, &c., and according to the levels defined on the sections so deposited. The contention before us was that no such levels could be found so deposited, and two witnesses had in fact deposed that the plans were so inaccurate or defective that they could not find any such levels. The learned Judge, however, found no difficulty in discovering such levels, and upon a careful examination of the plans we agree with him that such levels are described sufficiently and clearly for any person really desirous to find in the plans what the Act of Parliament said was to be found there. That is to say, there is on the plan a section running through the centre of the proposed works, which shews a line said to be a line corresponding with the upper surface of the banks, and which shews that this line was to be four feet above Trinity high-water mark, and the cross sections shew the banks of the dock at a level really corresponding with this line. There was therefore a statutory direction that the banks were to be four feet above the Trinity high-water mark. It was not contended by the counsel for the Appellants that if that was so there was not a statutory obligation to make and maintain retaining banks or walls of that height. The words of the Act are that it should be lawful for the company to make their works according to those levels, and of course it was optional with them to make or not to make their works at all. But if they made them, and not to those levels, they would be in this dilemma—either from the neglect of that provision or condition the whole works were illegal, or the provision as to levels ought to be construed as imposing a distinct and

separate obligation to that effect, the breach of which would not invalidate all their Acts and proceedings, but would have to be remedied or punished like any other breach of statutory obligation.

Of course the company would prefer their liability under the latter construction to their liability to capital punishment, which would be the consequence of the former; and we prefer that construction. It was, however, with great energy and confidence, insisted before us that the liability was destroyed by the repeal of the Act which contained that section. That Act was repealed under the following circumstances: There were three dock companies, the *Victoria*, the *London*, and the *St. Katharine*, who applied to Parliament to authorize the two latter to be amalgamated and to absorb the first, and, to give effect to that arrangement, a new Act was passed repealing the existing Acts of the three companies, and providing for the creation of the powers and liabilities of the new company, the present Defendants. There was this peculiarity in the composition of the new Act, that although it repealed all the old Acts, it purported to continue in a schedule certain clauses, and among those clauses was not the 22nd section of the Act of 1853; and it was very strongly urged upon us that this very peculiar style of legislation operated as a very special and peculiar repeal of everything in the 22nd section so as to preclude the effect of the 92nd section of the amalgamating Act, which provides that the new company shall maintain, work, and use the three docks respectively subject to all statutory duties, obligations, and liabilities to which the three companies respectively immediately before the commencement of the amalgamating Act were, or, but for it, would become subject in respect of the three docks respectively. That contention is wholly inadmissible. When companies come to Parliament for an amalgamation for their own convenience, it would require very clear words indeed to induce the Court to conclude that they had contrived to slip in anything to destroy any existing liability in themselves or any existing right in any one else. And the 92nd section is, in fact, what one always expects to find and does find in all these Acts sanctioning private arrangements between existing companies; and there is really no doubt whatever as to the construction of the provision repealing the 22nd section of the old Act, and the 92nd section, taken

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together. The 22nd section is repealed as to powers, because the company itself is to go, and the powers of the amalgamated or new company are otherwise defined; but it is continued as to liability, except that such liability is transferred to such new company. We agree with the Court below, therefore, that the company was clearly under a statutory liability to maintain their banks up to the four feet level.

But, although we have thought it right to go fully into the whole of this case as to statutory liability, having regard to the fact that it was made the foundation of the judgment appealed from, and that it constituted by far the greater part of the case argued before us, yet, in the view we take of the case, it is really immaterial, for, if there were no such statutory liability, there is another and more extensive liability on the Defendants. There is nothing in the Act, either expressly or by implication, to affect the ordinary liability of the company as riverain proprietors who intermeddle with an existing river wall. They were authorized to take land and make works on the banks of the river, and what they did was to excavate a great bell-mouthed bay in the channel of the river, and to make a channel or cut from that bay into their dock, which is some distance back from the river, and in the execution of those works to destroy the existing river wall. They became landowners frontagers on the river, interfering with the wall rightfully insisted on by the Commissioners of Sewers, and as such they were as much liable to have and maintain a proper river wall as any other of the landowners frontagers there. If they had merely made the bell-mouthed bay, no one could have doubted that it was their duty to have and maintain a river wall around the curve, just as it was to have and maintain one across the chord of that curve. But they do not maintain such a wall around the curve if there is any opening in it. An inclosure or defence not continuous is no inclosure or defence at all. They were bound to have a river wall, and that wall a continuous one; and, therefore, the whole wall or bank, from the extreme point at one end of the bay, along one side of the Defendants' works round the docks, and back to the extreme point at the other end of the bay, was and is the river wall which it is their duty to have and maintain. If the gates which are across what is called the lock

had been closed to the inflowing tide, that would have completed the wall at that place; but they were constructed so as to open to such tide. In fact, the Defendants' works, being all open to the tide, and the water in them at high tide being part of the same sheet or body of water as that of the mid-channel, the bell-mouthed bay, the lock, the cut, the docks constitute, in fact, a bay and creek of the river as much as any natural bay, creek, or other widening or opening to be found along the course of it. The whole of this wall or bank was, therefore, a river wall or bank subject to the like liabilities and jurisdiction as any other part of the river wall. The Defendants themselves called the officer of the proper Commissioners to prove that the standard appointed for the river wall had been, in November, 1875, and for thirty years previously, to his certain knowledge, 4 ft. 2 in. above Trinity high-water mark. And it was the plain duty of the Defendants, as riverain proprietors, to have and maintain a wall of that height.

But even if the Defendants had succeeded in establishing that they were not under any statutory or special liability, but only under the common law liability, to take proper and sufficient precautions, it would not, in our opinion, make any substantial distinction in their favour. In judging the question of fact whether they had taken proper and sufficient precautions, all the surrounding circumstances must be taken into consideration, and, in our judgment, it would be far from sufficient for them to shew that they had taken the precautions sufficient according to a table of tides for forty years. If there had been nothing else, that possibly might have excused them; but they ought to have set against that the judgment of the Commissioners, based on the experience and tradition of centuries, which had fixed 4 ft. 2 in. as the height. And we now know that, although up to 1874, for forty-one years, there had been no tide higher than 3 ft. 9 in. at the *Shadwell Dock* (which is said to be 3 inches higher than the *Victoria*), there were in 1874, 1875, and 1877 tides of 4 ft. 3 in., 4 ft. 6½ in. (the one in question), and 4 feet. The great probability is that the Commissioners had previously experienced similar tides, and had fixed 4 ft. 2 in. accordingly; and if in a matter connected with the inundation of a whole district a landowner prefers his own deduction from the experience of a few years (not even exhausting living

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memory) to the deliberate judgment of the constituted authorities, whose official experience and traditions must, as I have said, date from centuries back, he does it at his peril, and he cannot, in my judgment, be said to have taken and used every precaution and care reasonably to be expected from him under the circumstances. To what I have said is to be added that the Company's own engineer, before they began their works, had fixed 4 feet as the limit. And, if there had been any shadow of excuse for them before, it was, in my judgment, wholly and most culpably inexcusable in the Defendants not to have accepted the warning of the tide of 1874, as to which it is not suggested that it was due to any earthquake or other convulsion of nature, or to anything else than a peculiar combination of those causes which make some tides higher than others, and which might, therefore, be expected again to occur. It would be difficult, therefore, to fix even the common law liability at less than 4 feet.

The learned Judge was, therefore, clearly right in holding that the Defendants had been guilty of neglect and breach of duty, and making the consequential decree against them. But there was one matter which may possibly, and very probably, turn out to be a mere matter of form, on which we intimated that we did not agree with him. He made a declaration that the whole damages sustained by the Plaintiffs was due to the Defendants' wrong. And that arises in this way:—Assuming the liability to be to maintain the wall at 4 feet, as the Judge thought, or at 4 ft. 2 in., as we think, the tide is said to have been 4 ft. 5 in., although it is not very easy to reconcile that with the height of 4 ft. 6½ in. at the *Shadwell Dock*. But it must, for the present purpose and on the present occasion, be assumed to have been 4 ft. 5 in., and, therefore, there was a tide considerably higher than that which would have been kept out by the walls of the Defendants if they had strictly and fully done all that was incumbent on them to do. Upon this, it was contended by the Defendants that, as they were not bound to keep out a 4 ft. 5 in. tide, the Plaintiffs would have been equally flooded by that abnormal tide; and therefore no damage really arose from the Defendants' neglect. But this argument does not seem to us to be correct. Suppose that the same damage would have been done by the excess of height of

tide if the wall had been of due height, as has been done; yet, if the damage has been done by reason of the wall not being of due height, the Defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause. And, moreover, long before the tide rose even to 4 feet, it began to flow over towards and into the Plaintiffs' works; and, of course, the Defendants cannot escape their liability for the damage so occasioned because the tide afterwards went on swelling and swelling, even if it could be shewn that the same damage would have been occasioned by that additional height of water if the banks of the Defendants had been in proper condition. They had been guilty of neglect, and had done damage before that extra height had been reached, and their liability to the Plaintiffs was complete when the damage was done.

But, however, it was further suggested that the whole damage was not due to the Defendants' neglect, and that, as there was a tide supposed to be 4 ft. 5 in., that tide might have occasioned, and it is contended by the Defendants that it did occasion, a substantial and ascertainable portion of the Plaintiffs' damage. No doubt, if the Court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the tide above the proper height which it was the duty of the Defendants to maintain, occurring after the excess had occurred, and which would have happened if the Defendants had done their duty, then there ought to be a proper deduction in that respect. If I were to judge upon the evidence as it stands, supposing nothing to be shaken and nothing to be altered or controverted by new evidence, I should have no hesitation in agreeing with Mr. Justice *Fry* as to this. Having regard to the time at which it is alleged that the water burst over in a cataract and overcame the efforts of the Plaintiffs to barricade the openings into their works, and to what they did in 1874, and what they might have done in 1875 if they had had more time to prepare and only a few inches' height of water to deal with, and the immense difference there is between the tide rising equally over the whole length of the river wall and distributing itself impartially over the whole district, and the tide finding a

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very weak part, a great depression and opening, immediately over the Plaintiffs' property,—I say, having regard to all those things, the Defendants have a very difficult task to shew that any portion of the damage was not due to their neglect. But the difficulty in the way of sustaining the declaration on that subject is this—that that question does not appear to have been sufficiently in issue or tried at the hearing of the cause. It was very early assumed that the amount of damage would be a matter of reference, and it does not appear that the question whether, on any ground or any principle, some deduction ought or ought not to be made from the damage, was really gone into. Indeed, until the question of liability was ascertained, and the extent of that liability—whether the limit was 3 ft. 8 in., as the Defendants have contended, and whether they had failed even to satisfy that limit, as the Plaintiffs contended, or 4 feet or more than 4 feet—it was practically impossible for the Defendants to direct their cross-examination or examination in chief to the question whether any, and, if any, what damage was due to the excess of the tide above that limit. The judgment and decree of the Judge will, therefore, be affirmed, with a variation—omitting the declaration to which I have referred. The Appellants must pay the costs of the appeal.

Solicitors for Plaintiffs: *Kingsford, Dorman, & Kingsford.*
Solicitor for Defendants: *W. M. Hacon.*

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[1872 W. 185.]

Nov. 6, 8, 22, 26, 27, 28.

Agency—Commission—Overcharges—Knowledge of Principal—Opening settled Accounts.

Where accounts are impeached and it is shewn that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the Court will make a similar order if such accounts are shewn to contain a less number of errors, or if they contain any fraudulent entries.

Semble, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim.

Statement.

THE Plaintiffs in this suit had for many years carried on business as merchants and agents at *Calcutta*, under the firm of "*Williamson Brothers & Co.*"

The Defendants had for many years carried on business at *Manchester* as merchants and commission agents.

In 1850 an arrangement was entered into between *Williamson, Herriot, & Co.*, of *Calcutta*, in whose names the business of the *Calcutta* house was at that time carried on, that the Defendants' firm at *Manchester* should act as agents for them for the purchase and shipment of *Manchester* goods upon the terms then agreed upon. These terms, as subsequently modified, were agreed upon between the firms of *Williamson Brothers & Co.* and the Defendants, and were embodied in letters between the parties, and were the terms on which the agency was continued for many years; and the commission allowed by the terms so agreed upon was, as the Plaintiffs alleged, to have covered all the Defendants' profit in respect of the agency.

The object of the present suit was to open, as against the Defendants, the accounts in respect of their said agency from the year 1853 until shortly before the commencement of the suit in 1872,

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but as the Defendants' books could not be produced previous to the year 1860, the evidence in the case was limited to the period from 1860 to 1872.

The grounds on which the Plaintiffs impeached the Defendants' account were, in substance, as follows:—The Plaintiffs alleged that the Defendants had, during the whole period of their agency, made false charges in their invoices, debiting the Plaintiffs with large sums which the Defendants had never paid, or which they had received back from other persons to whom they purported to have paid them under the name of discounts, and that they had also made other charges which in their position as agents for the Plaintiffs upon the terms agreed upon they were not entitled to make, particularly for profits which they were alleged to have made in the purchase on behalf of the Plaintiffs of grey and white shirtings, on bleaching the white goods and in packing the goods which they shipped for the Plaintiffs; that, although the Plaintiffs generally sent their bills to the Defendants to be discounted, the Defendants often discounted such bills for themselves and used the money; and that, when bills were entered by the Defendants in the accounts as having been discounted on a certain day, they were often discounted on a later day and at a lower rate.

The Plaintiffs further alleged that, whereas they had instructed the Defendants to insure the goods in the best offices, they had often not done so, but had sent the goods at their own risk, at the same time charging the Plaintiffs with insurance premiums higher than would have been charged in the best offices.

The Plaintiffs prayed that the Defendants might be declared liable to pay the amount of the alleged overcharges and the profits alleged to have been improperly made in connection with their agency, and that for this purpose proper accounts might be taken, and inquiries made, and directions given. The Defendants denied that they were agents except for the purpose of purchasing goods for the Plaintiffs; they alleged that they acted in part as principals and in part as agents; that, as regards many of the charges complained of, they were entitled to a fair profit on the goods, and were justified by the course of dealing between the parties, by the custom of the trade in *Manchester*, and by the knowledge of the

Plaintiffs in respect of the charges complained of. The Defendants also alleged that they were themselves the insurers of the goods, and justified the charges made in respect of such insurance.

The evidence was very voluminous, and it is unnecessary to refer to it for the purpose of the present report.

Statement.

When the suit came on for hearing the counsel for the Plaintiffs were requested to select two cases of overcharge under each head of complaint.

Witnesses were examined especially with the view of establishing on behalf of the Defendants that the Plaintiffs had actual or constructive knowledge of the course of business pursued in the Defendants' house, and of the mode in which their charges were made, and also of the custom of the trade in *Manchester*. The Defendants endeavoured to establish that the Plaintiff, *W. C. Williamson*, had had conversations many years ago with gentlemen connected with the Defendants' business, especially with Mr. *Herriot*, who was for many years one of the Defendants' clerks, and had thus become acquainted with the course of business pursued by the Defendants and the nature of their charges. They also adduced evidence to shew that one of the Plaintiffs, *William Craik*, had been in the house of Mr. *William Graham*, a *Manchester* and Indian merchant, and had the chief management of the department for buying, preparing, and packing goods in *Manchester* for export to *India*, and was therefore conversant with the manner in which the charges in respect of such goods were made out, and with the custom of the *Manchester* trade.

Argument.

Sir *Henry James*, Q.C., *Chitty*, Q.C., *Robinson*, Q.C., and *Bryce*, for the Plaintiffs.

Sir *John Holker*, A.G., *Benjamin*, Q.C., *Marten*, Q.C., and *Romer*, for the surviving partner of the Defendants' firm, and for the representative of a deceased partner.

Southgate, Q.C., *Edwards*, Q.C., and *K. M. Mackenzie*, for one of the Defendants who had retired from the firm.

Davey, Q.C., and *Levett*, for one of the Defendants who was dismissed from the suit.

M. R. JESSEL, M.R.:—

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Judgment.

I do not desire to hear a reply in this case, upon which I have for some considerable time made up my mind. A very large portion of the evidence has been given in writing; I have therefore had full opportunity of considering it during the long period which the case has taken in discussion, and during the interval which elapsed between the opening of the case and its further prosecution. I have also received, as I generally receive, a great deal of assistance from counsel.

This is a bill by principals against their agents to take accounts or rectify accounts which have been settled. The period over which they extend is nearly twenty years, and the substance of the allegations is that the accounts contain numerous and serious errors. The form of pleading, no doubt, is not quite in accordance with what the judgment will be, because by the form of pleading the Court is asked to do that which no Court can do, namely, to go through the accounts and to disallow a large number of items in taking those accounts, and make declarations accordingly. That is a thing which the Court, so far as I know, never did. The practice of the Court of Chancery, which of course is the practice of the High Court of Justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify; that is, if the Court is of opinion that errors of sufficient number and sufficient magnitude are shewn, it is not, as I understand it, necessary that the errors shewn should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or errors caused by fraud, the Court has a right to open the accounts. I have known cases—for instance, *Clarke* v. *Tipping* (1), which we are familiar with—in which the Court abstained purposely from using the term "fraud," although I am afraid no other term could be properly applied. That is not necessary. But there is this to be considered, that when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is, the trustee or agent—is the Defendant, it is easier to open the account than it is in cases where persons do not occupy that position—that is to say, that a less amount of error will justify the Court in opening the account.

(1) 9 Beav. 284.

Then I have one other observation to make, which is that, where you shew a single fraudulent entry in the case of persons occupying the position of principal and agent, or trustee and *cestui que trust*, the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me; I mean in the case of *Allfrey* v. *Allfrey*, before Lord *Cottenham* (1). We therefore have this as a sort of guide without laying down any general rule, because every case must depend on its own circumstances, that where the accounts have been shewn to be erroneous to a considerable extent both in amount and in the number of items, or where fiduciary relations exist and a less considerable number of errors are shewn, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shewn, there the Court opens the account and does not merely surcharge and falsify.

The effect of course is very different. Where you open the account, the account is taken from the beginning, and in those cases where, as in this case, the books are lost for a certain period, the Court does not now do what it formerly did, namely, insert special directions in the judgment which were necessary to protect the person accounting who, in the ordinary course of business, as has happened in this case, destroyed his books. Up to 1860 some of the books seem to have been destroyed—not improperly, because of course merchants do not keep their books for ever, and the loss of those books might put the Defendants into a difficulty. Formerly, when the accounts were sent to the master, it was the custom of the Court to insert special directions in the decree in order to avoid the hardship which the innocent loss of the books or the innocent destruction of the books might subject Defendants to. That is not necessary now, because the same Judge who orders the accounts to be opened presides over the taking of the accounts in Chambers.

The substance of the case is really very simple indeed, although the details are enormous. The Plaintiffs say that they employed the Defendants as agents to buy and ship goods for them. When I speak of the Plaintiffs I mean the firm for the time being, and in the same way when I speak of the Defendants I mean the

(1) 1 Mac. & G. 87.

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Judgment.

Defendants' firm for the time being. They were not the same people throughout, but for all substantial purposes I treat them as one, though in drawing up the judgment care will be taken only to make the separate Defendants responsible for what occurred in their own time.

The Plaintiffs say that from the very beginning of their connection they had two sorts of engagements or arrangements with the Defendants' firm. As to one class of business they make no complaint, and therefore the judgment will not relate to that in any way. But, as to what I may call the commission business, they say that they employed the Defendants as their commission agents in *Manchester*, they being a firm in *Calcutta*. The Plaintiffs employed the Defendants as agents to buy and forward goods to them at *Calcutta*, and they allege that, being such agents and being paid on commission, the Defendants throughout the period of the connection made gross and fraudulent overcharges in their accounts. That is the charge. It is not necessary of course to prove the whole of that charge, as I have already explained.

Some of the charges may not be fraudulent; some of them may not be such as would justify me in opening the accounts. But if I once come to the conclusion that there are a sufficient number of errors proved, and of sufficient amount to entitle me to open the accounts, it will then be of course necessary to consider the other charges when we come to take accounts in Chambers. If I arrive at the conclusion that one or more overcharges are proved, it may not be perhaps strictly necessary to consider so very nicely the number or the amount of the other overcharges, but I am bound before opening the account to shew that there are sufficient grounds for opening that account and nothing more. I am not bound to decide upon the propriety of every item which is challenged by the Plaintiffs in the Defendants' account. Were I to do so, I do not know when my judgment would end.

That being so, the first question to be decided between the parties is a question of fact. Were the charges made against the Plaintiffs merely the prices paid by the Defendants? As to that there is no contest. For all material purposes that is made out by the Defendants' books, or is admitted by the answers. The Defendants justify the making of the charges on various grounds,

but there is no dispute between the parties that on the items of invoice very frequently sums were charged which were not paid.

[His Lordship then went through in detail the various allegations of overcharge as regarded the various classes of goods, and the charges for packing, the allegations in respect to discounts and insurance, and the various grounds of defence set up by the Defendants, and considered that the Defendants had failed to rebut the Plaintiffs' charges. He then considered the defence raised with respect to the additions made by the Defendants to the cost of bleaching the white goods, as to which the Defendants said that such charges were fair charges according to the custom of the *Manchester* trade, and that the Plaintiffs must have known of it and be bound by it. With reference to the effect of the alleged knowledge of Mr. *Craik* and Mr. *Herriot*, his Lordship observed:—]

I should like to say a word or two as to the principle which I think ought to guide the Court in deciding these questions. The case set up by the defence appears to me to savour somewhat of novelty. As I understand the doctrine of partnership, which for this purpose is a branch of the law of agency, notice to a partner in a partnership matter during the continuance of the partnership is as a general rule notice to the firm. It has not, so far as I know, been held that notice to a man who afterwards becomes a partner is notice to the firm. It might be so held. We have the analogous case of notice to a solicitor who is also for this purpose an agent. Notice to a solicitor in the same transaction, or in any connected transaction, while he is acting for the same client, is notice to the client, but notice to him even prior to his acting for the client may be constructive notice to the client where it is clear he must have had it present to his mind, that is, he could not be supposed to have forgotten it when he was transacting the business of the client. It might well be that such an extension of the doctrine might apply in some cases to the case of partnership, but I am not aware that it has ever been so applied.

When we come to a question of fraud different considerations arise. It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm. A very obvious instance of the absurd result that would follow from such a doctrine may be shewn, and is best shewn, by an example. Suppose there is a firm

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with half-a-dozen partners who have a clerk, and the clerk has been in the habit of receiving presents from one of the sellers to the firm in order to pass goods of short weight, and further suppose that the clerk, not having been found out, is taken into partnership as a junior partner and continues the practice. Is it to be imagined, under these circumstances, that in a Court of Equity the other partners could not sue the vendor of the goods for the fraud, and not only sue him but their partner also? Could it be said that the knowledge of the partner was the knowledge of the firm for this purpose? I emphatically deny that any such doctrine could by any possibility be laid down by any Judge, and I need not say it never has been laid down.

Of course fraud must be an exception. I put the case of a clerk knowing it before he became a partner, and not interfering with it afterwards. But it is immaterial that the knowledge was acquired during the partnership. Suppose, either from corruption, that is, from receiving presents or otherwise, or affection, the goods being supplied by a relative, one of the partners knows that the vendor is defrauding the firm. I am satisfied that, according to sound doctrine, that knowledge would not prevent the remaining partners from suing the parties to the fraud, and recovering in a Court of Equity. It appears to me that that kind of notice will not do when it is applied to cases of fraud.

But when you come to notice before the partnership, relating not to those transactions but to prior transactions, there are some other considerations. First of all, if the clerk has been employed, we will say, in the house of the persons committing the fraud, and then goes into the house which has been defrauded, it by no means follows that he knows that the former house will continue their course of fraudulent conduct. He may think, "They are aware that I know all about it, and they will not attempt to go on now that I have become a member of the firm," or if he has the opinion that they will go on, then you can only look upon him as an accomplice. He may be influenced by gratitude in the case of the former masters having recommended him to the firm in which he has become a partner, or he may be influenced by that curious feeling of honour which is said to extend to a very low class as regards morality, and think that he ought not to betray the inte-

rests of his former masters, but that he ought rather to suffer the small loss attributable to his small share as junior partner in the house than be guilty of that which he may think a breach of duty. But in no way that I can see is actual knowledge of an antecedent fraud to be carried by the partner into the new firm of which he becomes a partner and thereby notice to be imputed to them.

But I am bound to say on looking to the evidence, that I do not think it comes up to anything of the sort.

[His Lordship reviewed the evidence respecting Mr. *Herriot's* knowledge when a clerk in the Defendants' firm many years before he became a partner with *Williamson*, and considered that the Plaintiffs could not through him have knowledge imputed to them. His Lordship further reviewed the evidence of the question whether, as the Defendants alleged, the Plaintiff *Craik* was fully conversant with the custom of the *Manchester* trade as to these charges, which custom, His Lordship considered, had not been proved to exist (the different houses in *Manchester* carrying on business in different ways), and therefore, in His Lordship's opinion, no knowledge of it could be imputed to *Craik*. His Lordship further considered that the allegation that *Williamson* himself knew of these charges was disproved. His Lordship added:—]

It appears to me that it is impossible to acquit these Defendants either of the knowledge of what was being done, or the knowledge that what was being done was wrongfully done.

[After a lengthened review of the various grounds of defence, His Lordship concluded thus:—]

It seems to me on all these points the Defendants fail. For the reasons I have given it is not necessary for me to go into the other cases of overcharge. When the accounts are taken in Chambers I shall be able to do justice between the parties by allowing them remuneration where remuneration is due, though not charged in that character, and by disallowing other overcharges, if it turns out that they are in excess of fair charges. But I do not make those other charges the grounds of my present judgment. In my opinion the charges which I hold to be proved are fourfold more than enough to induce me to have the whole of the account opened from beginning to end, and therefore I refrain from going into the other

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details. The judgment will be to open the accounts in the usual way, with the limitation which I have before explained as regards each of the Defendants, and that the Defendants do pay the costs of the action up to and including the trial.

An appeal from His Lordship's decision was for a long time pending, but it was subsequently abandoned, and an arrangement was come to between the parties.

Solicitors for Plaintiffs: *Phelps, Sidgwick, & Biddle*, agents for *Sale & Co., Manchester.*

Solicitors for Defendants: *Milne, Riddle, & Mellor*, agents for *Hinde, Milne, & Sudlow, Manchester; Bower & Cotton.*

M. R. 1878 *March* 28.

In re HALL & BARKER.

[1878 H. 64.]

Solicitor and Client—Separate Bills of Costs in the same Bankruptcy—Taxation after Twelve Months—6 & 7 Vict. c. 73, *s.* 37.

The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.

Accordingly, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of *S.*, a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down,—on an application by *S.* to tax both bills, more than twelve months after the delivery of the first:—

Held, that they must be treated as separate bills, and that the second bill only could be taxed.

In re Street (1) commented on.

Statement.

THIS was a summons adjourned into Court on the application of *John Sands*, that it might be referred to the Taxing Master to

(1) Law Rep. 10 Eq. 165.

tax and settle the bill of costs of *F. T. Hall* and *Theodore Barker*, solicitors, in and relating to the matter of the bankruptcy of *Augustus Ahlborn*, which bill it was alleged by *Sands* had been delivered to him in part on the 8th of September, 1876, and completely on the 16th of February, 1877.

It appeared that *Hall*, one of the partners, was retained by *Sands*, who was a creditor of *Ahlborn* in February, 1875, to protect his interests in the bankruptcy, and that he acted for him in the matter till the 21st of December, 1875, when *William Edwards* was appointed trustee in bankruptcy, after which *Hall* continued to act as solicitor for *Sands*, and also for *Edwards*. Ultimately an arrangement was came to in the bankruptcy under which the bankrupt's effects were to be handed over to *Sands*, and he undertook to pay the creditors a composition of 17*s*. in the pound, and also to pay the solicitors' costs, but it was arranged that the bankruptcy should still be kept alive.

On the 8th of September, 1876, the solicitors sent to *Sands* their bill of costs, amounting to £796 13*s*. 9*d*., down to the 17th of June, 1876, at which time the business was completed with the exception of the settlement of some small outstanding claims, and the sale of certain leasehold property. The following letter was at the same time sent to *Sands* by the solicitors:—

"*Re Ahlborn.*

"Herewith we beg to hand you an account of our charges in relation to this matter, a portion of which should be in the ordinary course chargeable against you personally, and the remainder against the trustee in bankruptcy. However, as arranged with you some time back, we send the whole to you, and trust you will find the amount satisfactory. You will observe that the charges are brought down to the 17th of June, 1876. There have been further items since then, and before the matter is finally closed there will be something more to do, but not, we hope or think, anything of much importance."

Subsequently part of the bankrupt's leasehold estate was sold, and the solicitors deducted the amount of the bill of costs from the purchase-money. This was done, according to *Hall's* statement, with the sanction of *Sands*, but *Sands* denied that *Hall* ever

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details. The judgment will be to open the accounts in the usual way, with the limitation which I have before explained as regards each of the Defendants, and that the Defendants do pay the costs of the action up to and including the trial.

An appeal from His Lordship's decision was for a long time pending, but it was subsequently abandoned, and an arrangement was come to between the parties.

Solicitors for Plaintiffs: *Phelps, Sidgwick, & Biddle*, agents for *Sale & Co., Manchester.*

Solicitors for Defendants: *Milne, Riddle, & Mellor*, agents for *Hinde, Milne, & Sudlow, Manchester; Bower & Cotton.*

M. R. 1878 March 28.

In re HALL & BARKER.

[1878 H. 64.]

Solicitor and Client—Separate Bills of Costs in the same Bankruptcy—Taxation after Twelve Months—6 & 7 Vict. c. 73, s. 37.

The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.

Accordingly, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of *S.*, a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down,—on an application by *S.* to tax both bills, more than twelve months after the delivery of the first:—

Held, that they must be treated as separate bills, and that the second bill only could be taxed.

In re Street (1) commented on.

Statement.

THIS was a summons adjourned into Court on the application of *John Sands*, that it might be referred to the Taxing Master to

(1) Law Rep. 10 Eq. 165.

his bill of costs until that period had arrived. That was the old principle at common law.]

The same principle was followed in the case of *In re Street* (1), where, on an application to tax three bills of costs of a solicitor in relation to the sale of three estates, one of which bills had been delivered more than twelve months, Lord *Romilly* considered that the clients were entitled to treat all the bills as referring to the same transaction, and to refuse to settle one without having the others.

The question was considered in the case of *In re Cartwright* (2), before Lord *Selborne*, sitting for the Master of the Rolls, where successive bills having been delivered relating to the same matter and on the same retainer, a letter written by the solicitor was treated, under the special circumstances of the case, as bringing them down to an entire bill, though most of them were delivered more than twelve months before the application for taxation. There his Lordship observed: "It is not, therefore, necessary for me to say anything about the rather important question, which was raised in a more general form by the arguments of Mr. *Fry* and Mr. *Yate Lee*, namely, that upon the principle of the cases of *Stokes* v. *Trumper* (3) and *Whitehead* v. *Lord* (4), neither of which was a case of taxation, and of *In re Street*, which was a case of taxation, it is a correct view to hold, that, where the relation of solicitor and client has been continued, and the business of a particular retainer continues in a particular suit with reference to the same matter, if a client has a succession of signed bills sent in to him, each bill so sent in is to be regarded as an addition to the others, and as bringing the first bill down to the date of the latter, so that in the end the whole are to be treated as one single bill down to the date of the latest delivery. The argument was that these cases and their principle justify that general conclusion, which has not been disproved by any actual authority cited on the other side. That seems to me an important question, though not requiring decision in the present case. My own impression would be, that if all the cases could be looked at, which have been very numerous both before Lord *Langdale* and the present Master

(1) Law Rep. 10 Eq. 165.
(2) Ibid. 16 Eq. 469, 474.
(3) 2 K. & J. 232.
(4) 7 Ex. 691.

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of the Rolls, it might be found difficult to reconcile that proposition with some of those cases. But those cases have not been cited to me, and I think that question should be reserved for future consideration if it should ever require to be determined."

In the present case, although the strictly regular course might have been for the bill to be made out against the trustee in bankruptcy, and for it to have been taxed in the bankruptcy, yet, as the solicitors were retained by *Sands* to protect his interest as well as to act for the trustee in bankruptcy, and as the costs related to the one matter, the client was entitled to treat the two bills as one, and not to settle until the whole business had been disposed of. According to the evidence of *Sands*, he was not aware at the time that the solicitors had deducted the amount of the first bill from the proceeds of the sale of the bankrupt's estate. The solicitors by their letter shew that they consider the bills as relating to the one matter, and that being so, we submit that they should be treated as one bill, and taxed accordingly.

Roxburgh, Q.C., and *W. Bush Cooper*, for the solicitors.

Judgment.

JESSEL, M.R.:—

I shall not call upon you, Mr. *Roxburgh*.

This is an application to tax a bill which was delivered more than twelve months before the summons was taken out, and the question is raised whether or not the bill was actually delivered within the twelve months, not as a question of fact, but as a question of law, and that is raised in this way. It is said that the solicitors were engaged to protect the interest of Mr. *Sands*, in the matter of one *Ahlborn*, who had become a bankrupt, and who, at that time, was heavily indebted to Mr. *Sands*. It is said that the fact of his having employed them as his general solicitors was an employment in respect of one matter. It is said they were employed, at Mr. *Sands*' request, to protect his interests personally until *Ahlborn* became a bankrupt, to act for the trustee in bankruptcy, to protect his interests after the arrangement had been made by which the creditors accepted from Mr. *Sands* a composition of 17*s*. in the pound, and to protect his interest until every asset was got in. All that is represented to me as protecting his interest in one

separate transaction, and as being a single retainer, and that the solicitors were not entitled to be paid anything until every individual matter relating in any way or in any form to the interest of Mr. *Sands*, in relation to the estate of *Ahlborn*, had been finally disposed of. Claims might have been made which would have occasioned a lapse of years to work out. Other questions of difficulty might have arisen when the bankruptcy had been practically completed, which might have taken half a century to work out.

Of course, if it is the law, I am bound by it, but I say most emphatically, unless it be the law, I will not endeavour to make it so, because I cannot imagine a state of law more injurious. The theory would be, that a solicitor, having undertaken to dispose of any matter of business, however complicated, for however many years it might possibly last, would not be entitled to get one single penny of profit from the client until that business was finally disposed of. It does not commend itself as a doctrine which would appear to me to be reasonable. It is not said to be founded on any statute. If the doctrine exists it is a doctrine of the common law, and, like all the doctrines of the common law, it is to be found set forth in some decided case or cases. I must accordingly look to the cases.

It has undoubtedly been decided that the retainer of a solicitor at common law to bring an action is a retainer to do one single thing, to bring the action to an end. Actions at common law did not, in former days, occupy a very long time, and were comparatively simple matters. Common Law Judges were perhaps not so familiar as they might have been with equitable proceedings, and there are instances where, to avoid, or to get rid of what was considered an unjust application of the *Statute of Limitations*, they extended that doctrine to a suit in equity. Whether at that time the doctrine had been generally so extended or not, is, I think, exceedingly doubtful. Of course a suit in equity which might relate to a number of different matters might be continued to such a period of time that, if the doctrine extended to suits in equity, one might be compelled, if the case called for discussion and decision, to limit its application to some period or periods during the suit short of the final disposal of it.

For instance, in an administration suit you may invest the

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property during the tenancy for life, which may last fifty or sixty years, and you could not finally dispose of the property until the tenant for life died. Could you say, in a suit of that kind, that a retainer of a solicitor was of such a character that he could not be paid a single penny beyond his out-of-pocket costs against his client until the final conclusion of the suit? I for one am quite unable to arrive at that conclusion, even on the authority of the common law cases. Again, it might be very reasonable to say that the solicitor's right would arise at the first interlocutory order, that is, that he would be entitled to say, where an order had been made that accounts should be taken, that he had then earned his right to be paid, and was not bound to wait until the accounts were actually taken.

Why you should extend any such doctrine I am at a loss to see, nor do I intend myself to attempt to extend it. I cannot see any reason for assuming that a solicitor undertaking a business of this complicated nature, such as the administration whether of a dead man's estate or an insolvent man's estate, which may give rise to a score of suits, and may occupy a score of years before it is finally wound up, should be held to do a single and entire thing and not be entitled to be paid any remuneration until that single and entire thing is done. I think it is reasonable that a solicitor should not be held to have entered into such a contract.

That being so, we will see what the reason was which induced Baron *Parke* to lay down the principle. In the case of *Harris* v. *Osbourn* (1) that learned Judge says this: "The cases which have been cited may be explained either upon the supposition that this is to be treated as a general contract, or upon the supposition that it is a special contract, to carry on the suit to its termination, subject to be put an end to on reasonable notice. In ancient times it was considered as an entire contract, of which the attorney could not divest himself by any means; but, in consequence of the increased expenses of suits in modern times, the rule has been varied, and the attorney is at liberty to determine the contract on reasonable notice. The contract of the client is to pay at the completion of the suit; and unless the contract be defeated by reasonable notice, the attorney has no cause of action, and the *Statute of*

(1) 2 C. & M. 632.

Limitations is no defence." As I understand it, it is said there that it is considered that, when a person undertakes to carry on a cause, he enters into a special contract to carry it to its termination. I do not mean to say that under no circumstances he can put an end to this contract, but it cannot be put an end to without notice. If he discharges himself he cannot get his costs. If the client does not choose to advance the proper funds, then the solicitor can divest himself of it, or get rid of it. That is under the same doctrine.

If a man engages to carry a box of cigars from *London* to *Birmingham*, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one half the price. That is intelligible. In my opinion, in the case of a solicitor there is not an implied contract of that kind. It bears no fair relation to the doctrine of entire contract. It is a series of services which, though nominally in relation to one matter, is in reality in relation to a succession of matters, and it is not within the doctrine of entire contract, because it is not within the mischief of it. It is not reasonable that a solicitor should engage to act on for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself. In my opinion it would be not only an unwise but an improper extension of the doctrine of entire contract to apply it to such a case as this. But, even if it were right, there must be a break somewhere. In the case of a Chancery suit I have shewn what sort of break you may have. In the case of winding up there are all sorts of breaks. Is it to be supposed that, because a few matters are undisposed of, the solicitor is not to be paid until the final termination?

In this case there was a break when the arrangement was finally come to by which Mr. *Sands* became entitled to the whole of the assets. Then it was that his solicitors sent in their bill. I am told they have not asked for payment, but what did they send in the bill of costs for? Why, pending the relation between solicitor and client, is a bill sent in? How could the client have understood it? He could only have understood it as an application for payment, and there is no doubt he did so understand it, for they paid themselves

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out of the moneys in their hands. He knew they wanted payment, and when they sent him their second account he knew they wanted payment. It is quite true when they sent in the first account they said in effect, "This is not a final bill; there will be some more business to be done, but not a great deal more." I do not see anything in that beyond a notice to a client that the account did not include all the costs he would have to pay. The transaction amounts to this, in my opinion: "We have done so much work; there is a convenient break in the business, up to which time we have made up our bill of costs; please to pay us up to that time, and when the outstanding matters are concluded, which we hope will be shortly, we will send in a further bill."

As regards the case of *In re Street* (1), I cannot find that Lord *Romilly* decided the present point at all. I think he decided the case upon special circumstances. The point is not mentioned in the heading, and in the argument in the case of *In re Cartwright* (2) that case does not appear to have been so treated by Mr. *Fry*. I very much distrust myself, or any Judge, in endeavouring to find a reason for a judgment where there are no reasons given; at the same time I cannot help saying that the circumstances in that case were very peculiar; it was not the ordinary case of solicitor and client at all; it was a case of a trustee entitled to sell real estate, and entitled to charge as solicitor as if he acted as solicitor for the trust. He sold the real estate as trustee. In fact he was his own client. He was the trustee to sell, and, as I read the case, he could not have charged the *cestuis que trust* anything; he only had a right to deduct out of the trust property the amount of his costs; that was his position. But he did send copies of bills of costs to some of his *cestuis que trust*, and two of them complained. If he could not make them pay, and it does not appear to me he could, it was not, I think, a case in which the question of delivery within the twelve months was the only point to be considered, because it was not a case of direct liability of the client to the solicitor; and it would seem also that, having a right to charge the trust fund, it might be well said that he could not pay himself until he had realized the trust fund, and paid all his charges. I do not say it was so, but it does

(1) Law Rep. 10 Eq. 165. (2) Law Rep. 16 Eq. 472.

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seem to me to distinguish the case very much from the ordinary case of a transaction between a solicitor and client where the client is personally liable to pay. Though I am quite unable to see what the exact view of Lord *Romilly* on the matter was, when I find that none of these common law cases were cited, and that the argument did not proceed on any such ground, and that no notice of any such ground is taken in the judgment, I think it was a judgment not directed to this point actually, but that it was one of the special circumstances which induced his Lordship to come to the conclusion at which he arrived.

I think, therefore, I am not hindered by any authority from deciding as I do now. So far as I may cite authority at all as bearing on the general question, the opinion, not final, but provisionally expressed in *In re Cartwright* (1) is entirely in accordance with the view which I take at the present moment. The summons will be granted as to the second bill only, and the applicant must pay the costs.

Solicitors: *Johnsons, Upton, & Co.; Denton, Hall, & Barker.*

GETHING *v.* KEIGHLEY.

M. R.
1878
April 11.

[1877 G. 104.]

Partnership—Action for Account—Single Error—Liberty to surcharge and falsify—Errors appearing on Books.

Where an account is impeached, if a single important error is established, the Court will not, except in the case of fraud, order the whole account to be opened, but will make a decree that the Plaintiff may be at liberty to surcharge and falsify.

In a partnership action, where one error of £950 was established in an account long settled:—

Held, that in taking the accounts the Plaintiff should be at liberty to surcharge and falsify, and that such liberty should not be limited to errors appearing from the books.

Statement.

BY articles of partnership dated the 2nd of November, 1857, the Plaintiff and Defendant entered into partnership as solicitors for

(1) Law Rep. 16 Eq. 469, 474.

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the term of fourteen years, and afterwards continued in business as partners at will till the final dissolution.

There was only one general balance-sheet between the partners which extended from November, 1857, to the 31st of December, 1864. The account which was signed by both partners was in the handwriting of the Defendant, who, as the Plaintiff alleged, alone balanced and made up from time to time the books and accounts of the partnership.

The statement of claim alleged that the Plaintiff had lately ascertained that the balance-sheet did not agree with the partnership books, and contained serious errors; the account marked "assets" was alleged to contain an entry of the sum of £1950 "lent to *Henry Gething*," whereas no such sum was advanced to the Plaintiff at any time, but in the month of January, 1865, and after the date to which the accounts were brought down in the balance-sheet, the Plaintiff did receive a sum of £1000, part of £1950, the balance of which was retained by the partnership.

The Plaintiff also alleged that there appeared in the account headed "*Henry Gething's* loan account," dated the 14th of May, 1863, an item, "To cash to you, £406," whereas no such sum was debited in the books of the partnership to the Plaintiff, and the Plaintiff believed that no such sum was ever paid to him. The Plaintiff submitted that in taking the partnership accounts the balance-sheet ought not to stand as a settled account.

On the 9th of April, 1877, the Plaintiff and Defendant entered into an agreement that the partnership should be dissolved by mutual consent as from the 1st of January, 1877.

The Plaintiff claimed a declaration that the partnership was dissolved from the last-mentioned date; that an account might be taken of all partnership dealings and transactions between the Plaintiff and the Defendant; and that a receiver might be appointed.

The Defendant alleged that the Plaintiff signed the account as correct, after full opportunity of examining the same; that he (the Defendant) had ascertained since the dissolution, and admitted, that the sum of £1900, stated as having been lent to the Plaintiff, was incorrect, and ought to be £1000 only; that the sum of £406, though entered erroneously as a loan, was in reality due from the

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Plaintiff under another arrangement; that the balance-sheet had long been treated as settled, and claimed that it should be so treated. The Defendant was willing that the Plaintiff should be at liberty to surcharge and falsify the same, upon comparison of the cash and other books and accounts kept by the Plaintiff, but not otherwise.

Argument.

Davey, Q.C., and *Decimus Sturges*, for the Plaintiff:—

The books of the partnership shew one clear error of a large amount in the balance-sheet, and another smaller error, which, though accounted for, tends to shew that the books are untrustworthy. This being so, the Plaintiff is entitled to have the whole account opened.

Chitty, Q.C., and *Russell Roberts*, for the Defendant:—

The Defendant does not deny that there is one error of a large amount, but that alone, no fraud being alleged, is not sufficient to entitle the Plaintiff to have the whole of a settled account opened. The proper form in which the account should be directed is for the Plaintiff to have liberty to surcharge and falsify. This, however, should be limited to errors appearing on the partnership books, which should be taken as *primâ facie* evidence, as in *Ewart* v. *Williams* (1).

[The following cases were referred to: *Taylor* v. *Haylin* (2); *Allfrey* v. *Allfrey* (3); *Coleman* v. *Mellersh* (4); *Millar* v. *Craig* (5); *Pritt* v. *Clay* (6); *Williamson* v. *Barbour* (7).]

Judgment.

JESSEL, M.R.:—

I have no doubt myself as to the law on the subject. The statement of claim asks to open a settled account which has been settled a very long time. It alleges two errors, one of which is certainly proved, and it is a very considerable error. It is an entry of a sum of £1950 which ought to be £1000; that is, there is an error of £950 in a single item of £1950. The other error

(1) 7 D. M. & G. 68.
(2) 2 Bro. C. C. 310.
(3) 1 Mac. & G. 87.
(4) 2 Mac. & G. 309.
(5) 6 Beav. 433.
(6) Ibid. 503.
(7) *Ante*, p. 529.

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alleged is a sum of £406, which is really not an error in substance, because it ought to be charged; and £406 is actually charged. It is an error in form. It charges that as a loan, which was the result of another arrangement, which would have made the Plaintiff liable; and, although, being in substance right and in form wrong, it would not be a ground for opening the account, it does assist in inducing me to think that the account is not trustworthy. But, irrespective of that, I should have given the Plaintiff relief on the ground of the one larger item.

I think the old case of *Taylor* v. *Haylin* (1) shews that a single important error alleged and proved is sufficient to entitle the Court to open the account if it thinks fit to do so—especially as the Court must look at the nature of the account—either by opening it altogether or by surcharging and falsifying. That is stated most distinctly, as I read the judgment of Lord *Cottenham* in *Coleman* v. *Mellersh* (2), which refers to a single error; and the same point was actually the foundation for a decree for opening the accounts altogether where there was a single error of £2000, in *Pritt* v. *Clay* (3). So that we really have exact decisions on the point that one error alleged and proved will do, and there is a great deal of good sense in it. The Court sees from the nature and amount of the error that the accounts could not have been properly taken, and therefore that they cannot stand. The nature of the relief of course must depend on circumstances. It was decided by Lord *Cottenham* in *Allfrey* v. *Allfrey* (4)—and I stated in the recent case of *Williamson* v. *Barbour* (5) my intention of adhering to that principle to its full extent—that where a single item complained of was a fraudulent item, the proper order to make was to open the accounts altogether; but where the item complained of is not a fraudulent item, and the accounts are of some years standing, as these are, I should say that the proper order was only to give liberty to surcharge and falsify.

The rule is clearly laid down in *Davies* v. *Spurling* (6) by Sir *John Leach*, who says this (7): "In order to induce the Court to

(1) 2 Bro. C. C. 310.
(2) 2 Mac. & G. 309.
(3) 6 Beav. 503.
(4) 1 Mac. & G. 87.
(5) *Ante*, p. 529.
(6) Tam. 199.
(7) Tam. 211.

make a decree that the Plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established in the progress of the suit some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being in the view of the Court a reasonable inference that if there be one mistake there may be many mistakes; and the Plaintiff therefore ought to have the liberty of entering fully into those accounts with a view to proving other mistakes."

The same point exactly came before Lord *St. Leonards* when he was Lord Chancellor of *Ireland* in the case of *Lawless* v. *Mansfield* (1), where he says (2), "I shall inquire what the rule of the Court is before I enter upon the consideration of the items alleged to be erroneous. In ordinary cases the rule seems to be that the establishment of one mistake is sufficient to induce the Court to give a decree entitling the party to surcharge and falsify an account."

But there may be cases where the Defendant is entitled to say that although the Plaintiff only asks to surcharge and falsify he would not have settled the account at all had he been aware of the mistake, and he may insist on the accounts being taken *de novo*. There may be such a case, at the same time one cannot help feeling that where accounts have been long settled it is fair to both parties, in the absence of fraud, to give them merely liberty to surcharge and falsify, because that allows the account to stand, and only rectifies it in instances in which the person complaining can clearly prove that there has been an error. I think that is the right form of order to make here, and I make it accordingly.

The Defendant asks to limit the right to surcharge and falsify to errors appearing on the books. I am very unwilling to make a new precedent as to the form of taking accounts; and besides, that is not necessary under either the general law or the terms of the Act 15 & 16 Vict. c. 86, s. 54, by which the Court has power to make the books *primâ facie* evidence. In many cases, as in partnership cases, they are evidence by virtue of the general law, independently of the rules and power of the Court. Therefore the books

(1) 1 D. & War. 557. (2) 1 D. & War. 603.

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are admissible in evidence; but why should I make entries in those books conclusive evidence if the person complaining of them can by clear evidence at this distance of time shew that there is an error in the books? Where there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him. Then it must be considered that now the Judge himself takes the account, that is to say, it is taken under his supervision, and that if any specific direction is required from the nature of the case by reason of the loss of documents or vouchers, or the loss of memory or other special things, he can take it into consideration in Chambers, and give specific directions. Therefore there is no occasion to encumber the judgment or decree by giving this specific direction. It is far better to give that when the occasion arises than to run the risk of committing injustice by giving a general direction, which may not be found fairly applicable to the peculiar circumstances of the case, which can only be judged of when the accounts are taken.

Solicitors: *H. Gething; J. N. Keighley.*

M. R. 1878 *May* 24.

WILSON *v.* CHURCH.

[1878 W. 81.]

Parties—Officer of Corporation, Joinder of, as Defendant for Purpose of Discovery—Rules of Court, 1875, *Order* XXXI., *r.* 4; *Order* XVI., *r.* 14—*Representative Action on behalf of Bondholders—Dissentient Bondholder joined as Defendant—Practice—Absent Parties—Form of Proceeding.*

In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a Defendant for the purpose of discovery:—

Held, on motion, that, inasmuch as under Rules of Court, 1875, Order XXXI. r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as Defendant, and that, under Order XVI., r. 14, his name should be struck out.

In a representative action by a Plaintiff on behalf of himself and all other bondholders:—

Held, on motion, that a dissentient bondholder—it not appearing that there

were any others who dissented—should be added as a Defendant, but not in a representative character.

Such applications should, in general, be by summons in Chambers.

In an interlocutory application with which some of the parties to the action who had no interest in such application were not served, an order *nisi* was made to be binding on the absent parties three days after service unless they shewed cause.

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Statement.

THIS was a motion on behalf of some of the Defendants to an action in which in the first instance *W. M. Wilson* was sole Plaintiff, but in which by amendment the Plaintiffs were the said *W. M. Wilson* (on behalf of himself and all other the holders of the bonds of the Republic of *Bolivia*, issued in respect of a certain loan), and the Republic of *Bolivia*. The Defendants were Colonel *Church*, the *National Bolivian Navigation Company* (of which Colonel *Church* was chairman), the *Madeira and Mamoré Railway Company* (of which Colonel *Church* was also chairman), *J. H. Lloyd* and *A. J. Lambert* (who were trustees for the said bondholders), and others. The original writ claimed relief against Colonel *Church*, but this was abandoned, and the amended statement of claim alleged that he was retained as a Defendant for the purpose of discovery against the navigation company and the railway company.

By the amended statement of claim the Plaintiffs alleged that a certain engagement had been entered into between the bondholders and the Bolivian Government, and claimed a declaration that a certain trust fund in the hands of the Defendants *Lloyd* and *Lambert* ought not to be applied in payment for the works of the railway, and that it should be returned to the bondholders, and that these Defendants might be restrained by injunction from making any payment out of the trust fund to the navigation company or the railway company, or otherwise dealing with it.

The present motion was made on behalf of the first three Defendants, namely, Colonel *Church*, the navigation company, and the railway company, and also on behalf of *Llewellyn Nash*, a bondholder, to have the name of Colonel *Church* struck out, as being merely a formal Defendant, and made so for purposes of discovery, also to have the name of *Llewellyn Nash*, a bondholder who had not adopted the engagement made by the Plaintiffs with the Republic of *Bolivia*, added as a Defendant to represent such of the

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bondholders as dissented from that arrangement, also to have the record amended by making the Plaintiff sue only on behalf of those bondholders who had accepted the arrangement. The other Defendants were not served with the notice of motion.

Llewellyn Nash stated in his affidavit, in support of the motion, that the Plaintiff *Wilson* did not represent the interests and wishes of all the bondholders, and in particular did not represent his own; but the affidavit did not state that any of the other bondholders concurred with *Nash*.

Argument.

Chitty, Q.C., *Davey*, Q.C., and *Rigby*, in support of the motion.

Southgate, Q.C., *Fooks*, Q.C., and *Cozens-Hardy*, for the Plaintiffs:—

The old practice of the Court of Chancery, by which an officer of a company was made a Defendant for the purpose of discovery, is still in force. Order XXXI., rule 4, of the Rules of Court, 1875, is an additional provision, but not inconsistent with the old practice. The Plaintiffs have a right to keep Colonel *Church* before the Court.

It is premature at the present stage to add Mr. *Nash* as a Defendant, and moreover it cannot be done in the absence of the other Defendants.

Judgment.

JESSEL, M.R.:—

The point which has now been under discussion I should have thought was one not open to discussion. The new Act of Parliament, as I understand it, abolishes the old system of pleading both at common law and equity, and substitutes a new one which is to be found set forth in the schedule to the Act, and is therein described in a very full way, but it is preceded by the following note: "Where no other provision is made by the Act or these rules, the present procedure and practice remain in force." The only question I have to decide, therefore, is, whether there is provision made by the Act or rules for obtaining discovery from a corporation in defending an action. If there is provision made, there is an end of all the old practice, and that provision only applies.

I turn to Order XXXI., "Discovery and Inspection." I turn to rule 4, and I find there is provision made for obtaining discovery from a corporation: "If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at Chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly." That appears to me to point out plainly what the course to be pursued under the new system of pleading is, and the only course to be pursued when no other is authorized. Nothing could be more vexatious or annoying to a man than to be made a party to an action in which he has no interest, where he is a mere servant of another, and where he may be exposed to a large amount of expense in the shape of costs wholly without necessity.

When we come to look at the history of the legislation, we shall see that not only is this the plain meaning of the rule—which I should have held independently of any history—but also how it arose. The defect of the old common law system was, that it did not allow you, in an ordinary action at law, to obtain discovery from your opponent, and equity therefore invented the bill of discovery in aid of the Plaintiff in the action, or of the Defendant in the action, and gave that discovery, and, of course following its own rules as applied to actions at law, it gave a similar remedy where it was a suit in equity. Then came this difficulty, that a corporation answering not on oath, but under common seal, you could not indict the corporation for perjury, and you could not therefore have the usual remedy or sanction which enabled you to rely on the discovery, and so, to avoid that, the Courts of Equity allowed you to add an officer of the corporation as Defendant, to make him answer on oath, because, according to the then procedure, you could not interrogate him in any other way. You were therefore compelled to make him a Defendant. In process of time the Legislature thought fit to get rid of the necessity of resorting to Courts of Equity for discovery, by empowering the Courts of Law to give discovery in common law actions. Then what did the Legislature do? It did not adopt

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the method which was adopted by the Courts of Equity in suits in equity. That method was both cumbrous and expensive.

In the case of an officer made a Defendant, he had to get his costs from the Plaintiff if he could, and if he could not, he would have to bring a separate action against his employers for the purpose of indemnifying him against the costs of his defence. In the case of an ordinary bill of discovery, as we know, the Courts of Equity could not deal with the costs in any other way. The Plaintiff got discovery, and the Defendant was entitled to make the Plaintiff pay the costs of it, and he got his costs whatever was the result of the action. Nothing could be more cumbrous, and in many cases nothing could be more unjust than that the person who was right in the action should have to pay the costs of the discovery which enabled him to proceed. Then when the Legislature interfered, and interfered as usual in a piecemeal way, it merely gave the right of discovery in a common law action without interfering with the suit for discovery in equity; and the way in which it did it was this—by enacting the provisions of the 51st section of the *Common Law Procedure Act*, 1854, which is almost in the words of the provisions of Order XXXI., rule 4; that is, recognising the impropriety of making the officer a party to the action at Common Law, it enabled the person requiring a right to discovery to get an order to examine the proper officer on interrogatories. Then, of course, the parties to the action paid all the costs of the proceedings and the officer gave discovery, and had nothing further to do with the action.

When the Legislature inaugurated a totally new system of pleading, and established a new Court of Justice—for that is what the High Court is—the first question was, what system should they adopt in it, as there must be one system for all kinds of actions whether common law actions or equity actions, and they adopted the rule which had been adopted in common law actions, and that is the rule inserted in the schedule to the Act. There is no other practice extant applicable to equity actions. The old practice has ceased to exist. There is only one kind of action, and one kind of procedure, and that is the procedure pointed out by Order XXXI., rule 4.

Then it is said, in this particular instance Colonel *Church* is

the proper man to give discovery. The answer is, that will be decided at Chambers if you ask for interrogatories to examine Colonel *Church*, because it is allowed to deliver interrogatories to any member or officer of such corporation. It is for the Court to decide which member is to be interrogated, and if you shew reasons why one member can give the information and not another, or why one member can give information on one set of questions, and another member on another set of questions, the Court can direct which member or members shall be examined to give information. Therefore, there is no hardship on the Plaintiff to make him come and deliver interrogatories pursuant to the order of the Court. It appears to me, therefore, that Colonel *Church* is improperly made a party where he is made a party for the purpose of discovery only.

In this particular instance, there is no question that he is made a party for the purpose of discovery only, for the pleader has said so. There are cases in which it may be a matter of some difficulty to determine. You will have to read the pleadings and see, where a man is made a party against whom no relief is claimed in form, whether he is made a party for the purpose of discovery, or whether he is made a party with a view to find out his interest. But in this case no such question can arise, for the pleader has said so in so many words.

Then having arrived at the conclusion that he is improperly joined, what am I to do with him? I think again, that here the Legislature has pointed out exactly what I am to do with him. Order XVI., rule 13, says this: "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as Plaintiffs or as Defendants, improperly joined be struck out." Now there is no doubt that the Court may do so now because it may do it at any stage of the proceedings. If you came to the trial it would be absurd to strike him out, because you would dismiss the action. But what it means is this, if at any stage an application is made to strike him out, and it is proper to strike him out, of course the Court will strike him out. In the same way, if there are parties who ought

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to have been joined, the Court may order a Plaintiff or Defendant to be joined, or added. Then, if it is brought before the Court at the proper time, and if it is in time, of course the Court may do it if it thinks proper. But it is absurd to say that the Court "may" do so, if it did not mean that it was the duty of the Judge to add the party if the proceedings were in such a state that the party could properly be added. The Legislature were obliged to say "may," because it might be at any stage of the proceedings.

Then that being so, there being no pretence for saying this is not a proper stage, I order that the name of Colonel *Church* be struck out; and not only that he should be struck out, but that the Plaintiffs should pay his costs, because he was made a party improperly from the beginning, and as there has been an abandonment, that they should pay the costs of abandonment. When they amended by saying he was made a party for discovery only the action ought to have been discontinued against him. Therefore I order his name to be struck out, and I order them to pay his costs up to and including the date of the motion.

I will say a word about these kinds of application. I think these applications, as a general rule, should be made by summons at Chambers. In this case it has been made by motion, but the motion has been resisted on a question of pleading, and on a question as to the construction of the Act of Parliament. If such a question had been raised at Chambers, I should have adjourned the matter into Court for argument. Therefore, no extra costs have been incurred in respect of that, and I think Colonel *Church* is entitled to his full costs of motion.

There is another part of the motion, by which I am asked that Mr. *Nash* be joined as a party under Order XVI., rule 14.

The matter arises in this way: the Plaintiffs, or some of them, claim to represent the holders of the bonds of the Bolivian loan. They allege that they represent them all, and that it is for their benefit that a certain arrangement should be carried out. Mr. *Nash* says he is the holder of a very large number of these bonds, and he takes an opposite view to that of the Plaintiffs, and he says that they have no right to represent him, and he does not wish to be represented by them. That being so, he applied to me for an order that he be made a party as Defendant; and he further

applied that he should be entitled to represent all the dissentient bondholders. As regards the latter claim, inasmuch as Order XIV., rule 9, requires that there shall be "numerous parties" where one defends on behalf of others, and as he has not proved that there is anybody who dissents but himself, it is quite clear that I cannot make him a party in a representative way, and he cannot be a representative without a constituency. That is not the modern practice of legislation or pleading; but it does not at all follow that he is not entitled to be made a party. He has an interest even as an individual. He says, in effect, "my rights will be affected," and they certainly will, if judgment is given in favour of the Plaintiffs, "and I insist that I should be here to dispute the contention of the Plaintiffs." I think that is too plain for argument. He not only has an interest but a substantial interest. As there appears at present to be only one bondholder dissenting, the right course is to add him alone as a Defendant, and then, as it appears to me, the rules provide what is to be done, and if any unnecessary delay takes place, my Chambers are open to any application which may be made on that account.

As regards the costs of the application I shall make them costs in the action, and shall do so as a general rule, because it must depend on the result of the action whether or not the person who wishes to be added is properly added. If he is right the action will be dismissed with costs, and if he is wrong he will have to pay them. The only difficulty is that this motion has not been served on some of the Defendants, and as a general rule these applications should be made in the presence of all the Defendants, and as regards the course to be pursued on these applications, this, again, as a rule, should be by summons at Chambers.

Here, again, I do not say it was wrong to make a motion, because, looking at the importance and nature of the case, and the kind of argument likely to be addressed to me, I have no doubt that I should have adjourned this summons into Court also, but, at the same time, litigants must understand that if they serve notices of motion in the first instance instead of taking out a summons, they take the risk of the Court being of opinion that it was not a proper case to be adjourned into Court. And therefore it is safer in all cases to proceed by summons in the first instance.

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As regards the technicality of the other Defendants not being served, I may state that on this question the other Defendants have no substantial interest, and would not wish to be heard. That being so, I think it is a convenient mode, instead of allowing the motion to stand over and add to the expense and delay by serving all those people who have, as I said before, no interest in the matter, that I should make a conditional order that it shall be binding on them three days after service. If they shew cause to the contrary, or have any objection to make, they will apply to me, and then, of course, I must consider it.

Solicitors: *Wilson, Bristows, & Carpmael; W. W. Wynne.*

M. R. 1878 *June* 29.

MERCHANT BANKING COMPANY OF LONDON *v.* MERCHANTS' JOINT STOCK BANK.

[1878 M. 174.]

Limited Companies—Identity of Names—Registration—Injunction—Intention to deceive—Companies Act, 1862, *s.* 20.

There is nothing in the *Companies Act*, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of sect. 20 against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies.

Statement.

THIS was a motion on behalf of the Plaintiffs, *The Merchant Banking Company of London, Limited*, for an injunction to restrain the Defendants, *The Merchants' Joint Stock Bank, Limited*, from using the style or name of "*The Merchants' Joint Stock Bank, Limited*," or any other style or name so nearly resembling the Plaintiffs' name as to be calculated to deceive.

The Plaintiff company was established in 1863, with its registered office and place of business in *Cannon Street*, in the city of *London*, and, according to the evidence, had since acquired considerable reputation among the City mercantile community, being

generally known by the short title of the "*Merchant Banking Company*," or "*The Merchant Bank.*"

The Defendant company was incorporated in March, 1878, and had its registered office and place of business in *Great Russell Street, Bloomsbury.* Its object was to afford increased banking facilities to the retail tradesmen of *Tottenham Court Road* and the neighbourhood.

Statement.

In June, 1878, the manager of the Plaintiff company wrote to the secretary of the Defendant company, stating that the name of the latter company so closely resembled the name of the former as to lead to the certainty of some confusion, and requesting that steps might accordingly be taken by the Defendants to alter their name.

From the correspondence which then ensued, and which was in evidence, it appeared that the Defendants had originally applied to be registered under the name of "*The Mercantile Joint Stock Company, Limited,*" but that the Registrar of Joint Stock Companies refused to register that name on the ground that there was already on the register a "*Mercantile Bank, Limited;*" and that three or four other names were then submitted to the Registrar, one of them being the Defendants' present name, which the Registrar finally approved and registered.

The Defendants ultimately declined to alter their name, and hence the present motion.

There was no evidence that any person had been actually misled by the similarity of name, and the Defendants positively denied that they had any intention of injuring or in any way interfering with the Plaintiffs' business.

Argument.

Davey, Q.C., and *H. B. Buckley*, for the Plaintiffs:—

These names are substantially identical, and identity of names in companies is prohibited by the *Companies Act*, 1862, s. 20, which prescribes the steps to be taken where, through inadvertence or otherwise, a company has been registered by a name identical with that of a subsisting company.

Dundas Gardiner, for the Defendants:—

This is not an application under the 20th section, which more-

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over does not make it obligatory upon a company to take steps for changing its name when once registered. It is merely an enabling section. Here we were duly registered by the Registrar after full consideration: he must therefore be taken to have thought that our title was not calculated to deceive, and there is no evidence whatever that a single person has been in fact deceived.

Applications similar to this were refused in *Colonial Life Assurance Company* v. *Home and Colonial Assurance Company, Limited* (1), *London Assurance* v. *London and Westminster Assurance Corporation, Limited* (2), and *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Company* (3).

Davey, in reply:—

We rely on the fact that the Defendants are using a name similar to ours, from which we ask your Lordship to infer an intention to deceive. It is enough that the name has a tendency to deceive, according to the well-established rule that a business must not be carried on under a name calculated to mislead; the right to a trade name standing on the same footing as a trade-mark: *Burgess* v. *Burgess* (4); *Croft* v. *Day* (5); *Churton* v. *Douglas* (6). To entitle us to an injunction it is not necessary to prove any instance of actual deception: *Braham* v. *Beachim* (7).

It could never have been the intention of the Act that the mere fact of the registration of one company took away rights already existing in another company.

Here it is proved that the Plaintiffs are generally known as the "*Merchant Banking Company*," or the "*Merchant Bank*," the word "*Merchant*," being the leading or key-word, which is common to both these companies. In the three cases cited on behalf of the Defendants there was no such key-word. We submit, therefore, that the use of the word "*Merchant*" by the Defendants is calculated to deceive or mislead, and should accordingly be restrained.

(1) 33 Beav. 548. (4) 3 D. M. & G. 896.
(2) 32 L. J. (Ch.) 664. (5) 7 Beav. 84.
(3) 17 L. J. (Ch.) 37. (6) Joh. 174.
(7) 7 Ch. D. 848.

JESSEL, M.R.:—

I think that the Act of Parliament does not affect the Plaintiffs' right to make this motion.

As the law originally stood I think that any person might use his own name for the purpose of trade, and might use any fancy name for the purpose of trade. If a man's name was *Brown* or *Jones*, he was not compelled, according to the common law, to carry on trade under the name of *Brown* or *Jones*, but might carry on trade under any fancy name he chose, and the mere fact of somebody else having the same name and carrying on trade under that name does not prevent another person from doing the same. If *John Brown* sells coals, another *John Brown* may sell potatoes, and there is no law that I know of to prevent him from selling his potatoes under the name of *John Brown;* the first *John Brown* could not in such a case restrain the second *John Brown* from carrying on trade under his own name.

Again, nothing can be plainer than that if the first *John Brown* carried on business under the name, not of *John Brown*, but of *John Brown & Co.*, so might the second. What the law did prevent was fraud; and it prevented not only actual fraud, that is, fraud intentionally committed, but it also prevented a man from carrying on business in such a way, whether he knew it or not, as to represent that his business was the business of another man. And it might happen that the mere using a well-known fancy name would be evidence of an intention on the part of the person using it to commit a fraud. One can well understand a certain fancy name being so attached to a business as to indicate that business and that business alone, and that another man using the same fancy name in carrying on a similar business might be convicted of an intention to defraud from that circumstance alone. That might well be, but still after all it is merely a question of evidence.

Now, we have had the question before the Courts of Equity over and over again. There is the well-known case of *Croft* v. *Day* (1)—the case of *Day & Martin*, the blacking-makers in *Holborn*—in which there was no longer either a *Day* or a *Martin*, as in the original firm, both being long since dead, and the persons before

(1) 7 Beav. 84.

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the Court who then carried on their business, deriving title under them, were held entitled to restrain a real "*Day*" and a real "*Martin*" from trading under the name of "*Day & Martin*" as makers of blacking, because it was a manufacture of the well-known firm of "*Day & Martin;*" the reason for the injunction being that the name of "*Day & Martin*" had been adopted for the purpose of representing and holding out to the public that it was the old firm of "*Day & Martin.*"

There is another well-known case, I believe unreported, that of Mr. *Newman*, the colourman of *Soho Square*. It was held, that he was entitled to restrain another "*Newman*," a person who bore the name of "*Newman*," from setting up a shop as colourman a few doors off, and advertising himself as "*Newman & Company.*" There the Court held that there was an intention to appropriate the first *Newman's* business under the pretence of *bonâ fide* trading under that name.

Now, before the Act of Parliament, there was nothing in the world to prevent a man registering, for instance, the "*London and Liverpool Company*," for the purpose of trading in cheese, and another man registering a company under the same name for the purpose of trading in timber—a different trade—and although the name was identical, there was no equity in the first company to prevent the second carrying on its business. But then came an Act of Parliament which prohibited the registration of the same name in the case of companies, for by the Act of 1862 a direction was given to the Registrar of Joint Stock Companies that he should not register two companies under the same name, quite irrespective of the fact whether the business carried on was the same or not. The Act said (sect. 20) that "No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," except in certain cases. Then it goes on thus: "If any company, through inadvertence or otherwise," is so registered, then the company "may, with the sanction of the Registrar, change its name"—it cannot change its name without; it may be restrained from carrying on business, I suppose, in a proper case, still it cannot change its name without the sanction of the Registrar.

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Now, take the case I put before, of the cheese company and the timber company being both registered, it is quite plain there could be no injunction; and in that case, when they are once registered, the Act no longer applies. You cannot force either to change its name; so that really the right after registration is exactly the same right as before. Either company has a right to say, We are not prohibited by law carrying on trade under that name; the Act does not prohibit us.

That being so, I must consider what the facts of this case are, and they are very few and very simple. There is an old established bank, the Plaintiffs', *The Merchant Banking Company of London, Limited,* carrying on business in *Cannon Street,* in the city of *London.* In the spring of this year a new bank starts—a bank of an entirely different description, carrying on business in *Bloomsbury,* the one being in the City, having to do with merchants, the other being at the West End, and having to do with people who may be called merchants, and I think, according to the dictionary and by common usage, they are entitled to be called merchants, but still not quite merchants of the same class as the others. I speak with some hesitation as to the meaning of the word, but I see the *Imperial Dictionary* gives the meaning of the word as "any dealer or trader," and no doubt that definition would include potato merchants, and coal merchants, and wine merchants, and all sorts of people who are not usually called "merchants," standing alone; though I should have thought myself the common use of the word "merchants," standing alone, meant something very different.

That being so, these are certainly both merchants' banks; there is no fraud in the Defendant company in calling itself the "*Merchants' Bank,*" as it is intended to accommodate the traders of the neighbourhood, who, according to the dictionary, are entitled to be called or may call themselves "merchants." I do not think, therefore, there is any fraud on the part of the Defendants really shewn. The intention to commit fraud is expressly denied by their affidavits, and I cannot imagine what object they could have had in starting in *Bloomsbury* if they intended to take away the business of a well-established bank in *Cannon Street.*

Looking at these facts, I am of opinion that no fraud was

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intended—that it is a mere accident that the names are so closely alike. As regards the Defendants, it appears from the evidence that originally they did not intend to call themselves "merchants," but "mercantile," and that the Registrar refused to register "mercantile," as there was a "*Mercantile Bank*" already on the register, but that he selected the word "merchants" out of three or four names that were submitted to him, and finally registered that. I have no doubt that so far really there was no fraud intended by the Defendants, and no desire on their part to appropriate the business of the Plaintiffs for themselves.

The sole remaining point I have to consider is this: Is the name so similar that I must impute to the Defendants an intention to appropriate the Plaintiffs' business? Now, what I conceive would, in a case of this kind, amount to very clear evidence indeed of such an intention, would be where a man, say, of the name of *Coutts*, took a house in the *Strand*, and put up over the door "*Coutts & Co.*" I should have no hesitation, upon those facts, in saying that he intended to attempt to appropriate the business of Messrs. *Coutts & Company;* but, as I said before, the localities here being different, what are the names? The names of the Plaintiffs are "*The Merchant Banking Company of London, Limited*," and the names of the Defendants are "*The Merchants'*" (in the plural) "*Joint Stock Bank, Limited.*" In my opinion, there is not sufficient similarity in the two names necessarily to lead to the inference that there was an intention to deceive. As we know, in the case of these companies there are so many under similar names that people do look out for themselves; and here there is no pretence for saying any one has been deceived, or that any confusion has arisen through the similarity of name.

Now, when I come to look at the authorities—and there are three to which I have been referred—I must say they do not afford me so much assistance as I should desire; but they do give this remarkable result, that in every case where an injunction has been applied for it has been refused.

The only cases that I will mention are these. There is first the case of *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Company* (1). There

(1) 17 L. J. (Ch.) 37.

the ground of the motion was that inconvenience or damage would arise to the Plaintiffs from the use by the Defendants of a similar name, and they said in fact that it was usual to designate the Plaintiff society by the words "*London and Provincial Insurance Company.*" There the Vice-Chancellor refused the injunction.

The next case is that of the *London Assurance* v. *London and Westminster Assurance Corporation, Limited* (1), which came before another Vice-Chancellor. There again the Plaintiffs were an old corporation, the "*London Assurance.*" The other company was just starting, in the same business of course. But the Vice-Chancellor said he did not think it a case for an injunction, and refused to make any order.

The third case is that of the *Colonial Life Assurance Company* v. *Home and Colonial Assurance Company, Limited* (2). The Plaintiff company there was established in 1846, and the Defendant company in 1864, and of course the application was made soon afterwards. There Lord *Romilly*, considering that the company was established to do colonial business, and was *bonâ fide* established as a new company, held there was no right to the injunction, merely from the similarity of the names.

The only other case of which I am aware is a case before myself about a fortnight ago, in which a similar application was made by the *London and County Banking Company* v. *Capital and Counties Bank.* There, following the cases, I thought that the mere similarity of the names was not sufficient to shew any intention to appropriate, or any possibility of appropriating, the Plaintiffs' business, and I refused the injunction.

In this case I am quite satisfied that there never was an intention on the part of the Defendants to appropriate, nor a probability of their appropriating the Plaintiffs' business; and I am also satisfied that there is not likely to be any damage or injury to the Plaintiffs at all from the act of the Defendants; and that being so, I refuse the injunction. The costs will be costs in the action.

Solicitors: *Flux & Co; G. Rose Innes & Son.*

(1) 32 L. J. (Ch.) 664. (2) 33 Beav. 548.

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TALBOT *v.* FRERE.

[1871 T. 33.]

Mortgagor and Mortgagee—Executor—Simple Contract Debt—Retainer—Preference—Rights of Specialty Creditors.

12 Ch D 64
17 Ch D 525
18 Ch D 185
22 Ch D 606

Where a mortgagor dies insolvent, and the mortgagee then realizes his security and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate; the mortgagee being merely in the position of a trustee of the surplus for the estate.

And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member.

A., having mortgaged certain life policies to *B. & C.*, a firm of solicitors, to secure a bill of costs, died insolvent. *B. & C.* then received the policy moneys, and, after paying themselves their mortgage debt thereout, had a surplus remaining in their hands. *A.'s* widow and executrix then filed a bill against *B. & C.* for accounts and payment of the surplus, and a decree was made directing the usual mortgagor and mortgagee accounts against *B. & C.*, under which a balance was found due from them as mortgagees. After the decree *A.'s* executrix died, having appointed *B.* her executor, and the action was revived against *B. & C.* by substituting a judgment creditor of *A.* as Plaintiff:—

A summons by *B. & C.* to be allowed to retain the balance in payment of a simple contract debt due to them from *A.*, was refused, with costs.

The principle of retainer or preference in the case of a mortgagee or executor discussed.

Spalding v. *Thompson* (1), *In re Haselfoot's Estate* (2), and *Ex parte National Bank* (3), not followed.

Statement.

ADJOURNED SUMMONS.

By an indenture dated the 27th of July, 1868, Captain *Talbot* assigned (amongst other property) certain policies of assurance on his life to his solicitors, Messrs. *Frere & Forster*, by way of mortgage (but subject to certain prior mortgages) for securing a sum of £2000 due from him to the firm for costs and otherwise, with the

(1) 26 Beav. 637. (2) Law Rep. 13 Eq. 327.
(3) Law Rep. 14 Eq. 507.

usual proviso for redemption on payment by the mortgagor of the amount so secured, with interest.

In August, 1869, Captain *Talbot* died, having by his will given all his property to his widow, and appointed her his sole executrix.

Messrs. *Frere & Forster* eventually received the moneys which upon the testator's death became payable upon the policies, together with other moneys forming part of the above-mentioned mortgage security, and out of these moneys paid off all the mortgages, including their own, after which a considerable balance remained in their hands.

The testator was at his death indebted to a great number of creditors, both on special and simple contract, whose claims his estate was wholly insufficient to satisfy, and accordingly in 1871 the bill in this action was filed by his widow against Messrs. *Frere & Forster* at the instance of one *Keay*, a judgment creditor of the testator, for accounts against the Defendants as mortgagees and for payment of the balance remaining in their hands as such mortgagees, which balance Messrs. *Frere & Forster* claimed to retain on the ground that a sum of money exceeding the amount of such balance remained due to them from the testator's estate.

In 1872 a decree was made in the action directing accounts of all dealings and transactions, generally, between the Defendants, and the testator and his legal personal representative, and declaring that the mortgage of the 27th of July, 1868, should stand as a security only for what should be found due to the Defendants on taking such accounts.

In 1874 the Plaintiff Mrs. *Talbot* died, having by her will appointed the Defendant *Frere* her executor, and he was now her sole legal personal representative.

On Mrs. *Talbot's* death *Keay* was substituted as Plaintiff in the action by order of revivor.

Subsequently, in taking the accounts under the decree, the Chief Clerk was directed by the Judge to limit them to transactions between the testator, Captain *Talbot*, and the Defendants, as mortgagor and mortgagees—all accounts of moneys claimed to be due to the Defendants beyond the amount of their mortgage debt being thus excluded—and ultimately a balance of £1882 4*s.* 2*d.* was found due from the Defendants on that footing; but out of this

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balance the Defendants, and, in particular, Mr. *Frere*, as executor of Mrs. *Talbot*, the executrix of the testator, claimed to be entitled to retain the items so excluded from the accounts, and which items consisted of certain sums of money alleged to be due on simple contract from the testator or his estate in respect of payments or advances made by both Defendants to or on account of the testator during his lifetime, or on account of his widow as his legal personal representative.

This summons was accordingly taken out by the Defendants to obtain a declaration that they were entitled to retain the amount of the alleged simple contract debts out of the £1882 4*s.* 2*d.*, and to have all necessary accounts taken for that purpose.

Argument.

Chitty, Q.C., and *H. A. Giffard*, for the Defendants:—

This summons is based on the right, first, of Mr. *Frere* alone, as executor of Captain *Talbot*, and, secondly, of Messrs. *Frere & Forster* as Captain *Talbot's* mortgagees, to retain out of the balance found due by the Chief Clerk the amount alleged to be due to us from Captain *Talbot* on simple contract.

We admit there is, at first sight, a difficulty in maintaining our right as creditors on simple contract against the present Plaintiff's right as a judgment creditor; but it should be remembered that this was originally a suit by the mortgagor's legal personal representative, who could not herself have claimed to be a creditor of a higher degree than ourselves, and that the decree was a decree made for the benefit of the mortgagor or his legal personal representative. That decree still continues, and is not altered in any way by the mere fact that a person happening to be a judgment creditor of the mortgagor has the conduct of the proceedings.

Treating, then, this as a suit for the benefit of the mortgagor or his legal personal representative, who is now Mr. *Frere*, we rely on the ordinary right of retainer—as distinguished from set-off—to which an executor is entitled in respect of a debt due to him from his testator.

[JESSEL, M.R.:—The principle is, and always has been, one of preference, not of retainer. As the law formerly stood as regards executors—and it is the same still—an executor had a right to prefer one creditor to another as amongst creditors of equal

degree. He could not prefer a creditor lower in rank to a creditor higher. It followed, therefore, that if he was a creditor he had a right to prefer himself to another creditor of equal degree; and this was called "retainer" because he had the money in his own hands; but it was, in reality, the exercise of the right of preference in his own favour, and the proof that that was so was that he had no right of retainer against a creditor of a higher degree.]

Then, upon the second point, if the Plaintiff comes into equity as representing the testator's estate, he must do equity: and the equity here is that the mortgagees of the testator having a balance in their hands, the representative of the testator must do what the testator himself would have done, that is, allow them to retain out of that balance a debt due to them over and above the mortgage debt; for we, being mortgagees and having possession of this money, cannot, we submit, be called upon to give it up without payment of our simple contract debt. That such an equity exists, and that a mortgagee has such a right of retainer as we now claim, was decided by Lord *Romilly* in *In re Haselfoot's Estate* (1), which is on all-fours with this case, and in which his Lordship followed his previous decision in *Spalding* v. *Thompson* (2). Moreover, both those decisions have been recognised as law and followed by Vice-Chancellor *Malins* in *Ex parte National Bank* (3), where his Lordship says (4), "If *A.* creates a mortgage in favour of *B.*, and the mortgage being realized, he has the balance in his hands, natural justice would seem to point out that he would be entitled to retain the surplus and apply it in payment of a general debt due to him."

[JESSEL, M.R.:—I must confess I cannot see upon what principle those cases were decided. I should have thought equity and natural justice were exactly the other way. There can be no natural justice in allowing one creditor of a testator, simply because he happens to have a mortgage, to retain the balance in favour of himself to the prejudice of the other creditors, thus virtually giving himself another mortgage. If a man has a mortgage on a dead man's property, and he realizes the property and pays off the mortgage debt and has a surplus, surely, according to

(1) Law Rep. 13 Eq. 327.
(2) 26 Beav. 637.
(3) Law Rep. 14 Eq. 507.
(4) Ibid. 516.

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natural justice, the surplus ought to belong to the dead man's estate, to be divided among the creditors. He is only a bare trustee of the surplus. It seems to me that the correct view of the law is stated by Mr. *Hemming* in his argument in *In re Haselfoot's Estate* (1).]

It is laid down in *Fisher* on Mortgages (2), that simple contract debts due from the mortgagor may be tacked against him, so as to avoid the circuity of action which would result from the mortgagee-creditor being driven to enforce his claim as creditor by a separate action.

No doubt, if this were the case of a creditor suing and seeking to have a charge on the assets of an insolvent estate, a simple contract creditor could not, as against the creditor so suing, maintain a right to tack or retain; but this is not a suit of that character.

Davey, Q.C., and *Jolliffe*, for the Plaintiff, were not called upon.

[JESSEL, M.R., mentioned *Rolfe* v. *Chester* (3) and *Irby* v. *Irby* (4).]

Judgment.

JESSEL, M.R.:—

The testator in this case being entitled to policies of assurance on his life, mortgages them to certain persons in the usual way. After the mortgagor's death his executrix files a bill for an account, the mortgagees having received the policy moneys from the offices. As I understand the matter, if in such a case there is more than sufficient to pay—as there is here—the principal of the mortgage debt with interest and costs, the mortgagee is a bare trustee of the balance for the executor of the mortgagor, that is, for the mortgagor's estate.

But the mortgagees say, "We are simple contract creditors of the testator. We claim to keep the balance, or—if the balance exceeds the debt—a sufficient part of the balance in payment of our simple contract debt." That would be perfectly intelligible if the estate were solvent, as it would avoid circuity of action; but the executor says and proves that the estate is heavily insolvent: it is not even sufficient to pay the specialty creditors who, as the

(1) Law Rep. 13 Eq. 327.
(2) 3rd Ed. pp. 617, 619.
(3) 20 Beav. 610.
(4) 22 Beav. 217.

law stood at the date of this testator's decease, were entitled to a preference: and the executor says therefore to the mortgagees, "This is not avoiding circuity of action, but is an attempt on your part as simple contract creditors to gain a preference over creditors of superior degree; but even if there were no creditors of superior degree, and there were—as there are—a great many creditors of equal degree, it is also an attempt to take a preference as regards that degree; therefore I say it is not circuity of action at all, but an attempt on your part to get a preference over the other creditors."

There is no law, so far as I am aware, which entitles a person who is a bare trustee for the testator or for the testator's estate, to acquire by reason of his position as trustee, any charge or lien on the trust money in respect of a simple contract debt.

I asked the mortgagees' counsel, not unnaturally, on what principle such a doctrine could be founded. One ground they said was circuity of action. That I have disposed of. Secondly, it was said there is a doctrine of possession. According to our law, it is alleged, whoever gets possession of property may keep it if he can, and he has a right to keep it if he has any claim whatever against its owner. No doubt there is sometimes a general lien either by custom of trade, or otherwise, which entitles a creditor to keep the property deposited with him even for safe custody—to keep it until he is paid. That is a general lien given by law in the nature of a mortgage: instead of being special security it is a general security. There is not a pretence for anything of the sort here. What right has the mortgagee to keep the property? None that I know of, because even the right of set-off as at present subsisting is the creation of statute (1) by which, when a man owed money to *A.*, and was also the creditor of *A.*, he was entitled to set-off, but there could not be a set-off until action brought and set-off pleaded. In this case the mortgagee cannot plead set-off. He is a trustee of money for the estate, and his claim is only a simple contract debt against that estate.

As I said before, the Plaintiff is a specialty creditor and the mortgagees are simple contract creditors; their rights, therefore, are not rights of equal degree.

(1) 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 4, 5.

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Then a third ground was put, that he who comes into equity must do equity. I entirely agree with that. The question is, what is the equity? Assuming that there were no specialty creditors in the case, but that they were all simple contract creditors—all creditors of equal degree—the equity is to divide the assets equitably among them; and that is what the Plaintiff, as representing the testator's estate, says he wants to do. It appears to me he is willing to do equity, but that the trustees are not willing to do equity. They want to get a preference in the distribution of the assets. Therefore there does not appear any substantial argument on the third ground.

Then, the argument being exhausted—or for lack of argument—recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them. It is no use my commenting on them, I cannot make out any principle on which they were decided, and I confess I do not understand them. As I have often said, I cannot follow an authority unless I understand its principle. If a case lays down a principle it is a guide to other Judges, but a mere decision where you cannot find out the principle is of no use at all. The only use in citing an authority is as an illustration of some principle or rule of law, but where none is to be found and none to be extracted from the case cited, it is utterly useless for the purpose of a Judge, however desirous he may be of following it.

The law had been perfectly well settled on all these points many many years before those cases were thought or heard of, and I do not think the Judges who decided those cases intended to do more than to follow the rule of law already laid down: they did not intend to lay down new law.

That being so, it appears to me that the notion of the trustee having either a lien, or mortgage, or charge, or right of preference is wholly unfounded. No such right ever existed.

Reference has been made to the right of retainer by an executor. There is a right given by law to the executor, whether as a reward for his gratuitous exertions in winding up the estate or not, I do not know, but the Legislature has not thought fit to interfere with it, and that right is a positive preference given to him over all creditors of equal degree, and his retainer is a mere

exercise of that preference, when you examine it, in his own favour. Of course, if the mere fact of a man being in possession gave him that preference, there would be some ground for the Defendants' contention; but, as I put it in the course of the argument, I do not know that a preference is given to a creditor merely because he is in possession of assets. It could not be alleged, if the testator lent his creditor a horse, that the creditor could, after the testator's death, keep the horse until the debt was paid; or, if the testator put bonds which are payable to bearer in his creditor's hands for safe custody only, the creditor not being a banker or a person by law having a right of general lien, that he could keep the bonds because he was a creditor. The same principle would apply whether it was a bag of sovereigns, or a bond payable to bearer, or a horse: there is no distinction.

That being so, this claim fails. I think it fails on another ground. The debt is a debt due, not to Mr. *Frere*, the executor, individually, but to himself and Mr. *Forster* on joint account; and this is an attempt to carry the notion of preference beyond the right of the executor alone to the right of a firm in which the executor happens to be a partner, on the ground of the executor's right of preference as applied to a firm of which the executor is a partner. But the reason for such a right of preference is clear. It is a legal preference. The executor cannot sue himself, and he cannot prove against himself in any other way except by retainer. Now, he can retain on behalf of himself and partners, and that is the mere exercise of the right of preference at law, all partners suing together as one man. That is the explanation of the right of the executor to pay the joint debt of the partnership of which he is one of the partners. But that principle has no relation whatever to a person who by law has no preference. You cannot apply the doctrine of preference in the case of partnership where it does not apply to individuals; and, as I said before, this is quite a fatal objection, independently of the other one.

The summons is therefore refused, with costs.

Solicitors for Plaintiff: *Bower & Cotton.*
Solicitors for Defendants: *Frere, Forster, & Frere.*

Considered. Re COXEN. [1948] Ch. 747

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1878

July 14.

In re BIRKETT.

Will—Charitable Bequest—Object partly illegal—Repair of Tomb—Whole Fund given to valid Charity—Costs—Executor—Trustee Relief Act—Proceeding by Summons instead of by Payment into Court.

Bequest to the incumbent for the time being of *U.* of £500, the income to be applied, when necessary, in keeping in repair the grave and the railing and tombstone of *A.*, and the remainder of such income to be applied in providing wine and bread for the sick poor of *U.*, with a gift of the residue to the executor in trust for *B.* The executor paid the legacy into Court under the *Trustee Relief Act.* On petition by the incumbent:—

Held, that the first purpose of the gift being invalid, the whole of the income was applicable to the charity; and that the sum should be paid to the official charity trustee to invest and pay the income to the incumbent of *U.* for the time being to be applied by him for the sick poor of the parish, as in the will directed: the executor's costs not to be allowed out of the fund, though he might take it out of the residue.

The cases of *Chapman* v. *Brown* (1), *Magistrates of Dundee* v. *Morris* (2), and *Fisk* v. *Attorney-General* (3), commented on.

Semble, under the present practice, when it is doubtful to whom a legacy is payable, the better course is not by payment into Court under the *Trustee Relief Act*, but by an administration summons, waiving accounts, simply for the purpose of obtaining the decision of the Judge, or, after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the Judge.

If the executor does pay it in he will be left to take his costs out of the residuary estate, and will not have them out of the legacy.

Statement.

PETITION.

Margaret Birkett, who died in 1876, by her will, dated the 15th of March, 1872, gave the following bequest: "To the incumbent for the time being of *Unsworth* the sum of £500, the income to be applied when necessary in keeping in good repair the grave and the railing and tombstone of my late father, and the remainder of such income to be applied by such incumbent for the time being in providing wine and bread for the sick poor of *Unsworth*." The testatrix gave her residuary estate to her executor, *William Rawlinson*, in trust for *Thomas Butterworth* on his attaining the age of twenty-one.

(1) 6 Ves. 404. (2) 3 Macq. 134.
(3) Law Rep. 4 Eq. 521.

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The legacy of £500 was paid into Court under the *Trustee Relief Act* by the trustee and executor, and the Rev. *B. Compton*, the incumbent of *Unsworth*, now presented his petition for payment of the whole fund to himself to be applied for the benefit of the poor of the parish.

Argument.

Oswald, for the Petitioner:—

The gift of a portion of the income for keeping in repair the grave, the railing, and the tombstone of the father of the testatrix being void, there can be no apportionment of the fund between the residuary legatees and the charity, but the whole fund is applicable to the charitable purposes mentioned in the will: *Fisk* v. *Attorney-General* (1); *Dawson* v. *Small* (2); *In re Williams* (3). The Petitioner, therefore, is entitled to the whole fund to be applied by him as in the will directed.

Davey, Q.C., and *Warmington*, for the residuary legatee of the testatrix, and also for the trustee and executor:—

The whole of the gift is void; or if it be held that the charitable gift of the surplus is good, we contend that the gift of so much as will produce the income necessary to keep the tombstone in repair, which is an ascertainable amount, as in the case of the *Magistrates of Dundee* v. *Morris* (4), is void. In *Fisk* v. *Attorney-General*, Vice-Chancellor *Wood* seems to have misapprehended the *Magistrates of Dundee* v. *Morris*, and to have considered that it overruled a decision of Sir *William Grant* in *Chapman* v. *Brown* (5); but that is not so, for in *Chapman* v. *Brown* it was impossible to ascertain the amount required for the purpose named by the testator, namely, for the building of a chapel. The principle of the earlier cases of *Chapman* v. *Brown* and *Magistrates of Dundee* v. *Morris* is applicable to the present case, and though there are later decisions where a different view has been taken, they are capable of explanation.

We submit, therefore, that the residuary legatee is entitled, at any rate, to so much of the fund as would be required to produce

(1) Law Rep. 4 Eq. 521.
(2) Ibid. 18 Eq. 114.
(3) 5 Ch. D. 735.
(4) 3 Macq. 134.
(5) 6 Ves. 404.

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the income necessary to keep in repair the grave, the railing, and the tombstone mentioned in the will, supposing that purpose had been valid. If the gift of the surplus for the charitable object takes effect, the amount should, we submit, be paid, not into the hands of the Petitioner, but to the official charity trustee to invest and pay the income to the incumbent of *Unsworth* for the time being, to be applied by him for the poor of the parish, according to the directions in the will.

Judgment.

JESSEL, M.R:—

This case is a singular illustration of the way in which our law gets altered.

The question I have to decide is, whether this bequest is valid or not valid, as regards the whole of the income of a sum of £500, or as regards part of it.

Now I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide. If there were no authorities, I should hold, where there is a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of the income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained.

If, for instance, a man were to give an income of £10,000 a year in trust in the first place to keep his father's tombstone in repair, which under no conceivable estimate could exceed £20 a year, and directed the residue of the £10,000 a year to go to charity, I should assume that good law, which always means common sense, and common sense would concur in saying that the £20 gift was void, and that the £9980 was well given to charity. I should have felt no difficulty whatever in saying that was the law. I think, considering what the House of Lords did in the Scotch case which has been referred to—*Magistrates of Dundee* v. *Morris* (1)—where they appear to have held that a gift of a sum of money to found a hospital, which was in fact a school for 100

(1) 3 Macq. 134.

boys, was sufficiently definite, inasmuch as the amount required for the hospital could be ascertained, that you might say, in like manner, that the amount required for the repair of a tombstone is always sufficiently definite, especially where it is an existing tombstone, the average amount required for the repair of which might be ascertained by any competent person. It appears to me, therefore, in principle you would ascertain the amount required for the tombstone, and devote the rest to the purpose of charity.

I quite agree to this, that if the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole of the gift to the first object; and therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue. And that appears to me to have been the case of *Chapman* v. *Brown* (1), which I must say, with the greatest possible deference to three or four Judges, does not appear to me to be overruled by the case of *Magistrates of Dundee* v. *Morris* (2). In that case the House of Lords thought there was sufficient limitation pointed out by the will as to the charitable object to enable them to ascertain the amount required to be applied for carrying out that object. But in *Chapman* v. *Brown*, Sir *William Grant* was of opinion that there was not enough to enable him to decide; and I must say, if it were not improper for me to express an opinion as between Vice-Chancellor *Wood* and Sir *William Grant*, that in my opinion Sir *William Grant* was clearly right, namely, that there was not enough.

The purpose in the case of *Chapman* v. *Brown* was this. The testatrix gave the residue of her estate to executors "for the purpose of building or purchasing a chapel for the service of Almighty God." Now, could any human being say what would be reasonable for the purpose of building such a chapel? You might have any kind of chapel; you might have something very much like a barn, a kind of structure with which we are but too familiar in this country, or you might have a beautiful chapel resembling, for instance, *La Sainte Chapelle* in *Paris*, or the *Sistine Chapel* at *Rome*. I mean to say there is no possible limitation, so that there was nothing at all to guide the Court, that I can find, in the case

(1) 6 Ves. 404. (2) 3 Macq. 134.

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of *Chapman* v. *Brown* (1); and there was nothing to prevent the whole of the residue from being applied to the building of the chapel. The executors had a discretion. The testatrix said that there might be an overplus, and if there was, they might devote it to something else, but from the nature of the gift the whole of the residue might well have been applied to building the chapel. It does not appear that there was more than sufficient, if the whole of the residue were so applied, to build a decent chapel. It appears to me, therefore, that there is nothing in the authority of *Magistrates of Dundee* v. *Morris* (2) which at all interferes with *Chapman* v. *Brown*, the principle being, as I have said, that if you cannot fairly ascertain what is the extreme sum required for the first purpose, so that you may properly apply the whole property given to the first purpose, then of course, if the first purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails.

That being my opinion as to the case if it were untrammelled by any authorities, what do I find as regards authority? It is of the utmost importance, as regards our law, that Judges of the first instance should not disregard a series of decisions by other Judges of first instance, none of which have been appealed or have been otherwise interfered with. In the case of *Fisk* v. *Attorney-General* (3), in 1867, where there was a gift to an incumbent of a sum of stock upon trust out of the dividends to apply such part thereof as should be required to keep in repair a family grave, and to apply the surplus for charity, Vice-Chancellor *Wood* decided that, although the gift for the grave failed, yet the gift of the corpus was not affected, and the whole of the income was applicable to the charity. It may be difficult on principle to discover how he arrived at that conclusion, but he did arrive at it. The gift here in question is, to my mind, wholly undistinguishable from the gift there. I cannot find any possibility of fairly distinguishing it. That decision of the Vice-Chancellor was followed twice by Vice-Chancellor *Bacon*—once in the case of *Hunter* v. *Bullock* (4), in which he considered it settled law, and again in the case of *Dawson* v. *Small* (5). It was also followed by Vice-

(1) 6 Ves. 404.
(2) 3 Macq. 134.
(3) Law Rep. 4 Eq. 521.
(4) Ibid. 14 Eq. 45.
(5) Law Rep. 18 Eq. 114.

Chancellor *Malins*, in the case of *In re Williams* (1), so recently as the 2nd of June, 1877. Consequently we have four decisions, the oldest ten years old, all in point, by three Judges of co-ordinate jurisdiction. With these authorities before me, and sitting here as a Judge of first instance, I shall simply follow them, and decide the case in the same way.

The result will therefore be that the whole of the income will be applicable to the charitable purpose. The Respondents have very properly suggested that the fund should be paid over to the official charity trustee, and the income only given to the incumbent of *Unsworth* for the time being, to be applied by him for the charitable purpose named in the will; and that is the order I shall make.

Davey asked for the executor's costs.

JESSEL, M.R.:—

The Petitioner's costs must come out of the fund, but I cannot give the trustee any costs. He can take them out of the residue, but an executor trustee cannot, by paying a legacy into Court, relieve the residue from its proper burden. When there is a difficulty in determining how a legacy is to be applied, he should reserve some part of the residuary estate to pay the costs; but there is no justification, under the present practice, for an executor paying the legacy into Court, and so throwing part of the costs upon the legacy. This course of proceeding is not so cheap under the present practice as an administration summons, waiving the accounts, which can be simply adjourned into Court without any affidavit or petition.

There is also another course which is cheaper than payment into Court, and that is, to take out an administration summons, and for both parties to agree upon a statement of facts in the nature of a special case for the decision of the Judge, and then, if the parties wish, it can be adjourned into Court.

Solicitors: *Johnson & Weatherall; G. B. Wheeler.*

(1) 5 Ch. D. 735.

MORGAN *v.* SWANSEA URBAN SANITARY AUTHORITY.

[1878 M. 63.]

Vendor and Purchaser—Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87), *s.* 48—"*Bare Trustee*"—*Unpaid Vendor.*

A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the *Land Transfer Act*, 1875, s. 48.

Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the Act, so that upon his death, the money still remaining unpaid and the conveyance unexecuted, the legal estate passed to his heir-at-law.

Quære, Whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the Act.

Christie v. *Ovington* (1) considered.

Statement.

IN the year 1875 *Isaac Morgan*, being seised in fee of certain lands, contracted to sell them to the *Swansea* Urban Sanitary Authority for £200, and shortly afterwards the Sanitary Authority, in contemplation of their intended purchase and with *Morgan's* assent, entered into possession of the lands and had ever since remained in possession thereof.

The conveyance was engrossed, but was never executed by *Morgan*, who died suddenly and intestate in July, 1876. The Plaintiff, who was his widow and legal personal representative, called upon the Sanitary Authority to accept from her, as such representative, a conveyance of the property on the ground that inasmuch as at *Morgan's* death nothing remained to be performed on his part except to execute the conveyance and receive the purchase-money, he was at his death a "bare trustee" of the property within the meaning of sect. 48 of the *Land Transfer Act*, 1875.

The Sanitary Authority did not dispute the validity of the contract, but insisted that *Morgan* was not at the time of his death a "bare trustee" within the meaning of the Act, and that

(1) 1 Ch. D. 279.

the legal estate in the lands in question was vested in his heir-at-law; and the heir being an infant, they declined to complete their purchase until the contract was established by decree against him.

The Plaintiff then brought this action against the Sanitary Authority, claiming specific performance of the contract, and that it might be declared in whom the legal estate was vested, and who were the proper persons to convey.

The infant heir-at-law was made a co-Defendant.

H. Fellows, for the Plaintiff:—

The vendor was undoubtedly a trustee for the purchaser: *Shaw* v. *Foster* (1); *Lysaght* v. *Edwards* (2); the question is whether he was a "bare trustee" within sect. 48 of the *Land Transfer Act*, 1875. The vendor was not in possession at his death, nor had he any active duties to perform. A vendor in possession is, I admit, not a bare trustee, for he has duties to perform; as, for instance, he has to keep the property let: *Earl of Egmont* v. *Smith* (3); but here he had nothing to do but to execute a deed. In *Christie* v. *Ovington* (4) Vice-Chancellor *Hall* has expressed his approval of the doctrine laid down in *Dart's* Vendors and Purchasers (5) to this extent, that a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the section. Here the vendor was not the less a bare trustee because he had certain rights by reason of his having a lien for his purchase-money. If he had received his purchase-money he would unquestionably have been a bare trustee, and the mere fact of his having a lien for his unpaid purchase-money was not, I submit, sufficient to take him out of the section.

Davey, Q.C., and *Brynmôr Jones*, for the Defendants, the Sanitary Authority, and *Badcock*, for the heir-at-law, were not called upon.

(1) Law Rep. 5 Ch. 604; ibid. 5 H. L. 321.
(2) 2 Ch. D. 499, 506.
(3) 6 Ch. D. 469.
(4) 1 Ch. D. 279.
(5) 5th Ed. p. 517.

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JESSEL, M.R.:—

I am sorry to see that there is a difficulty on the construction of this Act of Parliament, and a difficulty so great that persons of great knowledge and learning, who have paid particular attention to the subject, entertain some doubt as to its meaning. I find that, the point having been brought before the Vice-Chancellor *Hall*, he was referred to what Messrs. *Dart* and *Barber* say in their valuable book on Vendors and Purchasers (1), and they express their view in this way: "The Act does not define what is meant by a 'bare trustee' in this and the preceding section; and the term is generally considered to be ambiguous; but it will probably be held to mean a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it."

Now these gentlemen occupy a position in the profession which entitles their opinion to be treated with great respect, even by a Judge, but I must say I am quite unable to follow it. First of all, what is the meaning of "a trustee to whose office no duties were originally attached?" I cannot imagine a trustee who has no duties. He must be a trustee for somebody. The very notion of a trustee is that there are some duties attached to the office. I suppose it means "active duties," in the sense of trusts to sell, or lease, or something of that sort. I must assume it does mean that, because the writers go on—"or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it."

Here, again, I have great difficulty in following the writers' meaning. If *cestuis que trust* are competent to request, and all request, every trustee must concur. There may be cases, of course, where some of the *cestuis que trust* are under disability, but I should have thought it was the universal rule that where *cestuis que trust* all agree, and are, of course, all competent to request, then on their requisition a trustee must convey. Therefore, one

(1) 5th Ed. p. 517.

does not quite understand the definition. I think it must mean where there are *cestuis que trust* all competent, and therefore entitled to call for a conveyance.

But here, again, I feel great difficulty. Where there are *cestuis que trust* all competent, and who together are entitled to call for a conveyance, even then it does not throw much light on the meaning of the words "bare trustee," because the bare trustee in that case might have active duties to perform.

Then I have got the opinion of the Vice-Chancellor *Hall* in *Christie* v. *Ovington* (1), where, after reading the passage I have quoted from Messrs. *Dart* and *Barber's* work, he says: "In my opinion the words 'has been requested by them so to convey it,' are not an important or a necessary ingredient to a person being a bare trustee." It seems to me that unless you have those words you can make no meaning of the expression "bare trustee" at all, because if the tenant for life or the remainderman has not requested, how can the trustee be called a "bare trustee"? What the writers mean must, I think, be this: Where a trustee has active duties to perform, and the *cestuis que trust* are more than one and have not requested, then he is not a bare trustee; but if they are all competent and have requested, then he is, because he has then kept the estate, so to speak, by wrong; that is, upon request he ought to have conveyed, and he is thus a "bare trustee." The learned Vice-Chancellor then concludes by saying, "Leaving out these words, I approve of the statement which I have read from their valuable work." If you leave out those words, I am utterly at a loss to make out any meaning of it at all. However, both the Vice-Chancellor and the writers I have mentioned agree that a person with active duties is not a "bare trustee" under the Act of Parliament.

I am sorry to say that, unaided by that assistance, I should have come to a different conclusion. I should have thought that a "bare trustee," or a "naked trustee," meant a trustee without any beneficial interest. We have this analogy at all events, that under the *Bankruptcy Act*, where a trustee has no beneficial interest, the legal estate does not pass; but where he has, it does pass. Besides that, I am utterly at a loss to treat a trustee who

(1) 1 Ch. D. 281.

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has a beneficial interest as a trustee and nothing more. The word "bare," or "naked," shews that he is nothing more than a trustee. Whether or not persons who are nothing more than trustees with active duties to perform are to be called "bare trustees," I do not say; but it appears to me clear that trustees who have a beneficial interest are not "naked" or "bare" trustees. It is not absolutely necessary for me to decide that other question, namely, whether a trustee who has active duties to perform is a bare trustee; but I do decide that a trustee who has a beneficial interest is not a "bare" or "naked" trustee under the Act of Parliament.

Now the present case is that of an unpaid vendor. He is not bound to convey until he is paid the purchase-money. He has a charge or lien on the estate for the purchase-money. All I can say is, according to my notion of the use of language, a man in that position could not be properly described as a "bare trustee." In one sense, no doubt, he has ceased to be the owner of the estate and is only trustee. In that sense he is liable to convey when he is paid the purchase-money, but it does appear to me that he is not a "bare trustee."

I expressly abstain from giving an opinion, until I am absolutely compelled, as to whether or not a trustee without a beneficial interest, but who has active duties to perform, is or is not a "bare trustee" under the Act of Parliament.

The result is, I hold that the vendor was not a "bare trustee" within the Act. The Plaintiff is, therefore, entitled to a judgment for specific performance, and there will be a declaration that the heir-at-law is trustee, followed by the usual vesting order.

Solicitors: *Crowder, Anstie, & Vizard; Johnson & Weatherall.*

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[1877 D. 237.]

Trustee—Breach of Trust—Married Woman—Trust for Separate Use—Payment of Dividends to Husband—Assent of Wife—Right to recover Arrears of Dividends.

The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her :—

Held, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced.

Statement.

UNDER the will of *Maria Brett*, a share of her property, amounting to £2836 15*s.*, was bequeathed to her surviving executor, *Francis Moore*, upon trust to pay the income thereof to the Plaintiff *Amelia Dixon* during her life for her separate use, and so that her receipts alone should be sufficient discharges for the same, and after her decease upon trust for her husband, *James William Dixon*, for life, and after the decease of the survivor of them, upon trust for their children as therein mentioned.

After the death of the testatrix, in 1866, *Francis Moore* invested the said trust fund in Government Stocks, and in 1867, at the request of *James William Dixon*, he sold out the said stocks, and invested the proceeds in the purchase of £2700 *East Indian Railway* Stock in the joint names of himself and *James William Dixon*, and they sent a written request to the directors of the *East Indian Railway* to pay the interest on the £2700 Stock to *J. W. Dixon*, taking his receipt as his sufficient discharge, and from that time the dividends were regularly paid to him. No formal appointment of *J. W. Dixon* as trustee was ever made.

On the 13th of July, 1870, *Francis Moore* died. In 1873, *J. W. Dixon*, without the knowledge of his wife, sold out the whole

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of the £2700 *East Indian Railway* Stock and appropriated the same to his own use. Since that time no dividends or interest of the trust fund had been paid to the Plaintiff *Amelia Dixon*, or to any person by her order, or for her use. *J. W. Dixon* had now left his wife, and had ceased to maintain her, leaving her and their children without any means of support.

The present action was brought by *Amelia Dixon* and her children, by their next friend, against *James William Dixon* and the executors of *Francis Moore*.

The Plaintiffs claimed a declaration that the Defendant *James William Dixon* and the estate of *Francis Moore* were jointly and severally liable to replace and make good the original sum of stock and the dividends which would have accrued thereon if the fund had not been wrongfully invested. The claim to the arrears of dividends was limited at the bar to the arrears which had accrued since the sale of the *East Indian Railway* Stock in 1873. The Defendant *Dixon* had disappeared, and the Plaintiffs were unable to serve him.

The liability of the Defendants to replace the trust fund was not disputed, and the only point raised in argument was as to the right of the Plaintiff *Amelia Dixon* to recover the arrears of dividends from the time when her husband sold the *East Indian Railway* Stock.

Argument.

Chitty, Q.C., and *C. Browne*, for the Plaintiffs:—

The Defendants the executors of *Francis Moore* are liable, as well as *J. W. Dixon*, who has absconded, to make good the amount of the trust fund, the transfer of which into the name of *Dixon* jointly with *Moore* was a breach of trust. They are also liable to pay to the Plaintiff *Amelia Dixon* the arrears of the dividends from the time when the *East Indian Railway* Stock was sold without her knowledge by the husband. No assent on her part can be presumed.

Davey, Q.C., and *Pope*, for the executors of *Francis Moore*:—

The only question is as to the liability of the estate of the deceased trustee to make good to the Plaintiff *Amelia Dixon* the arrears of the dividends from October, 1873, when the *East Indian Railway* Stock was sold by her husband. The right of a married

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woman to recover the arrears of income to which she is entitled for her separate use, and which has been paid to her husband, depends on her assent, express or implied, to the husband receiving it. There is no doubt that in this case the Plaintiff's assent would be presumed so long as the husband actually received the dividends. There is nothing to shew that she made any inquiry about them, or made any objection to their being paid to him, nor is there anything to shew that she made any inquiry afterwards. She cannot claim as against him any arrears during the time that he was living with her, nor can she claim them as against the representatives of the deceased trustee.

In *Caton* v. *Rideout* (1) it was held that, where a husband and wife had so dealt with the wife's separate income as to shew that they must have agreed that it should come into the husband's hands for their joint use, it would amount to a direction on her part that he should receive it. The same principle was recognised in the case of *Payne* v. *Little* (2), and is applicable here. The Plaintiff's assent must be presumed to the husband receiving the dividends so long as he lived with her and maintained her, notwithstanding his misappropriation of the trust fund, and the representatives of the deceased trustee cannot now be made liable to recoup them.

JESSEL, M.R.:— Judgment.

As I understand the law, the wife is entitled to recover the arrears of her separate income. It is not like pin money. In the case of separate estate she is entitled to recover the arrears of it, but if she consents to her husband receiving her income, and they have lived together, then she is not entitled to any account of it, either as against the trustee who may pay it to the husband, or as against the husband himself. The whole of that depends upon her consent.

In order to shew this, I will refer to the argument of the Solicitor-General, afterwards Lord *Cottenham*, in the well-known case of *Howard* v. *Digby* (3). After referring to some cases upon pin money—that being a case of pin money—he speaks of "these cases, and all the cases on the subject of pin money or other

(1) 1 Mac. & G. 599. (2) 26 Beav. 1.
(3) 2 Cl. & F. 634.

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separate estate" (for no distinction was made between them), "being decided on the ground of consent or no consent on the part of the wife."

In the case of *Caton* v. *Rideout* (1), where the husband himself was one of the trustees, and Messrs. *Currie*, the bankers who received the dividends for the trustees, paid them, with the sanction of the wife, Mrs. *Rideout*, to the account of the husband at Messrs. *Child's*, Lord *Cottenham* says this (2): "A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorizes the money to be paid to her husband he is entitled to receive it, and she can never recall it. No direct authority has been produced which affects the case before me. If the husband and wife, living together have for a long time so dealt with the separate income of the wife, as to shew that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him." Then, further on he says (3): "The question then is, was the money at Messrs. *Child's* in the hands of the husband, as husband, or as trustee? In the first place, it ought not to have got into his single hands as trustee at all; but it ought to have been under the control of himself and the other trustee. Messrs. *Currie* received it for the trustees, and then, with the joint concurrence of both husband and wife, paid it to the husband's separate account with Messrs. *Child*, the wife knowing it, and for years permitting them so to deal with it, without any interruption on her part. It appears then to me, as the evidence stands, that this payment was made to the husband, as husband, and not as trustee."

The other case to which I was referred, was that of *Payne* v. *Little* (4). In that case the husband was liable to pay the trustees some interest, and out of the interest the wife was entitled to an annuity; so that in substance, although not in form, the husband was liable to pay the annuity. The wife and the husband lived together, and Lord *Romilly* came to the conclusion that there was no sufficient evidence for him to interfere on the part of the wife.

(1) 1 Mac. & G. 599.
(2) Ibid. 601.
(3) 1 Mac. & G. 603.
(4) 26 Beav. 1.

I have nothing to do with the point whether the evidence was sufficient or not, I am dealing with the law, but that he came to the same conclusion as to the law is plain, because he says (1), "If Mr. *Payne* had received his wife's annuity, he would be entitled to the benefit of every fair inference, from which a contract, or an acquiescence on her part might be assumed, in case of an account being taken between them." Of course it must be contract or nothing. But by acquiescence he means consent, which in that case was equivalent to acquiescence. He adds, "I am of opinion that Mr. *Little* is entitled to the same benefit in any account to be taken between him and Mrs. *Payne*. If money has been *bonâ fide* and properly employed, it is wholly indifferent, in this Court, whether it has gone through the proper channels and the various stages and steps to arrive at that result; if the hand which was entitled to receive the benefit has really received it, the persons who ought to have first received it and then paid it over, cannot be made liable for it. I am therefore of opinion, that to the extent of any arrears of the wife's annuity accruing, while living with her husband, she must be treated as having allowed her husband to receive and apply it for their common benefit, and as if their separate incomes had been, by arrangement, applied by the husband for their mutual benefit, instead of the wife's income having, in the first instance, been received by her and then handed over to her husband for that purpose." So that he decided upon evidence which convinced him that there had been such an arrangement. It is therefore also an authority shewing that the consent of the wife was necessary.

There is very little other authority on the point. There is an earlier case of *Darkin* v. *Darkin* (2), which was before the same Judge, where he says this: "They"—that is, the shares—"were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton* v. *Rideout*, it might be inferred, that the wife knew of the manner in which they were applied, and had agreed that her husband should receive them for his own use and benefit." Then he says, that objection is met by contradictory evidence, but he puts it there according to his view of *Caton* v. *Rideout* (3); and I am

(1) 26 Beav. 3.
(2) 17 Beav. 578, 581.
(3) 1 Mac. & G. 599.

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shewing, therefore, that the same Judge does not and cannot intend to take a different view from that taken in *Payne* v. *Little* (1), where he considered that the wife had agreed.

The only other authority that I need mention is *Parker* v. *Brooke* (2), before Sir *William Grant*, which was a singular case. I think there was pretty strong evidence that the wife did not assent. The wife was entitled, under her father's will, to a lease. As there was no trustee, the husband became trustee of it, but it was for her separate use. The husband renewed the term in his own name, apparently not knowing anything of the rule of equity which made him a trustee, and after his death his representative was sued for an account of the rent, both of the original and the renewed term, and an attempt was made to limit the account to the time of the husband's death, the husband and wife living together; and we find this (3): "As to the account prayed against the representative of the husband, it was compared to the case of pin money; the account which is not carried back farther than a year. On the other side it was insisted, that the husband, having received property, settled to the separate use of his wife, clearly must account for it; and the Master of the Rolls said, there could not be any doubt in giving the account." There are no reasons given there, but when you look at the facts you will see that the wife could not be presumed to have assented. Neither husband nor wife apparently knew of the rule of equity that made the renewed lease the wife's property; and therefore there could not have been the presumption of assent, she not knowing the facts. So far as it goes, it is an authority, therefore, that, without knowledge, you must not presume assent.

The only other book which I intend to refer to is the last edition of Mr. *Macqueen's* book on Husband and Wife, and he states his view of the law (4). I only cite this as being a well-known text-book, and it is as well to see how it is stated. "If the wife see her husband receive her separate property and do not make a claim to it, she will in general, and, unless there be circumstances suggesting an opposite construction, be held to have made a gift of it. But if the circumstances do not warrant the inference

(1) 26 Beav. 1.
(2) 9 Ves. 583.
(3) 9 Ves. 588.
(4) Page 332.

that the wife has assented to" (now he is using the words of Lord *Romilly*) "or acquiesced in the husband's receiving her income, or in his mode of applying it, she will be entitled to reimbursement out of his estate." He puts it on the ground of assent.

Now, the case before me is this. The property in question was improperly invested by the trustee in the purchase of *East Indian Railway* Stock in the names of the husband and himself. The trustee died, and sometime after the husband sold out the proceeds and pocketed the money—a transaction which, of course, speaks for itself. The wife did not know of it. The husband would, of course, be liable to replace the money, or replace the stock which was sold out, and the representatives of the trustee are also liable. But the Defendants say, that from the date of the sale by the husband until, as I understand, the husband went away, or they ceased to live together, the wife loses the income, because prior to that time she allowed her husband to receive the dividends and retain them, and he maintained her.

That does not appear to me to be so. I cannot presume an assent by the wife to his retaining for himself the interest he was liable to pay upon the money which was received by the sale of the stock, or the dividends he was liable to make good on the stock if not sold out. She did not know that he had got the money. She did not know, therefore, that he was putting this sum into his own pocket. She might have been presumed to go on assenting to his doing what had been done before, namely, receiving the actual income; but I cannot presume an assent to his receiving that which she did not know that he was receiving at all, and the whole foundation of the doctrine depends upon her consent, either express, which is actual consent, or implied, which is sometimes called acquiescence—very properly so, if she knew of the fact of his receiving the income, and if she allowed him to retain it. It appears to me that this defence cannot be sustained, and I am of opinion that the dividends which the trust fund, if it had remained in the stock, would have produced, should be paid to the wife from the time when the *East Indian Railway* Stock was sold out by the husband.

Solicitors: *Harrisons; Henley Grose Smith.*

M. R.
1878
July 26.

LANCASTER BANKING COMPANY *v.* COOPER.

[1876 L. 23.]

Foreclosure Action—Judgment for Sale against alleged Heir-at-Law of Intestate Mortgagor—Heirship not proved—Order to set aside Judgment.

In a foreclosure action, where judgment had been obtained against the Defendant, the alleged eldest son and heir-at-law of the mortgagor who had died intestate and a contract for sale had been entered into subject to the sanction of the Judge in Chambers, it having been found that there was no evidence of the Defendant's heirship, on motion by the Plaintiffs it was ordered that the judgment be set aside, and the action dismissed without costs.

Statement. IN this case the Plaintiffs, who were equitable mortgagees of *George Cooper*, who died intestate, had brought their action against the Defendant, an infant, who was alleged to be his eldest son and heir-at-law, for foreclosure or sale. Judgment had been given in the action, and a contract had been entered into for the sale of the property, but before sanctioning the sale the Chief Clerk required evidence of the heirship of the Defendant. It then appeared that although a document which purported to be the certificate of *George Cooper's* marriage in *Stepney Church* in 1859, was produced, there was no evidence that such marriage had taken place, and it was presumed that, the Defendant being illegitimate, the intestate's brother was his true heir-at-law.

Argument. *T. L. Wilkinson* now moved, on behalf of the Plaintiff company, that they might be at liberty to amend the writ and all subsequent proceedings in the action by adding as party thereto any person claiming to be heir-at-law of the intestate, under Rules of Court, 1875, Order XVI., rule 13, or that the judgment in the action might be set aside, and all proceedings therein stayed until further order.

The Defendant did not appear.

Judgment. JESSEL, M.R., ordered the judgment to be set aside, and the action dismissed without costs.

Solicitors: *Redpath & Holdsworth.*

In re WHITEHOUSE & CO.

M. R.
1878
July 27.

Company—Voluntary Liquidation—Contributory—Debt due from Company—Right of Set-off against Calls—Companies Act, 1862, *ss.* 38, 101, 138.

Where a limited company is in voluntary liquidation, a contributory cannot set off a debt due to him from the company against calls made against him either by the company before or by the liquidator after the resolution to wind up.

Brighton Arcade Company v. *Dowling* (1) disapproved of.

Statement.

WHITEHOUSE & Co., Limited, was a company duly registered under the *Companies Act*, 1862.

At a meeting of the company held on the 7th of December, 1877, a resolution was passed for a voluntary winding-up, and a liquidator was appointed.

This was a summons taken out by the liquidator, asking that *David Rose* and *Henry Fulwood Rose*, who had both been settled on the list of contributories, might be ordered to pay respectively the sums of £289 2*s.* 9*d.* and £142 7*s.* alleged to be due from them in respect of calls made, as to part, by the directors of the company shortly before the date of the resolution to wind up, and as to the remainder, by the liquidator since that date.

Against his call *David Rose* claimed to set off the sum of £272 17*s.* 5*d.* due to him from the company on two promissory notes; and *Henry Fulwood Rose*, being a creditor of the company for £2500 advanced by him on mortgage, refused to make any payment whatever on account of his call, contending that he was entitled to set off the same against the mortgage debt.

Both contributories were admitted by the liquidator to be creditors of the company for the amounts claimed.

The summons was argued before his Lordship in Chambers, but was, by his Lordship's direction, adjourned into Court for judgment.

Argument.

Millar, for the liquidator, contended that there was no right in a shareholder to set off a debt due to him from the company

(1) Law Rep. 3 C. P. 175.

M. R. 1878 *In re* WHITEHOUSE & Co. Argument.

against calls in a voluntary winding-up; and cited *Grissell's Case* (1); *Black & Co.'s Case* (2), in which the contrary decision of the Court of Common Pleas in *Brighton Arcade Company* v. *Dowling* (3) was disapproved of; *Gibbs and West's Case* (4); and *Stone* v. *City and County Bank* (5).

Everitt, for Messrs. *Rose*, relied on *Brighton Arcade Company* v. *Dowling* as an authority precisely in point; and also cited *Barnett's Case* (6), in which *Calisher's Case* (7) was discussed.

Judgment.

JESSEL, M.R.:—

This case was argued before me in Chambers, but as it raised a question of very great general importance, and as to which the authorities are conflicting, I said I would give my judgment in Court, and I now give judgment accordingly.

The application was an application under the 138th section of the *Companies Act*, 1862, by the liquidator under a voluntary winding-up of this company, that two contributories of the name of *David Rose* and *Henry Fulwood Rose* might pay sums respectively of £289 2*s.* 9*d.* and £142 7*s.* which were due from them partly in respect of a call made by the company before the winding-up, and partly in respect of a call made by the liquidator in the course of the voluntary winding-up.

The amounts due on the calls were not disputed, but the contributories claimed to be allowed as set-off, as regards *David Rose*, nearly the whole amount of the claim, and as regards *Henry Fulwood Rose*, the whole amount, because he said he was a creditor for a larger sum. The liquidator admitted that the two contributories were creditors for those respective amounts, and therefore the only question that I have to decide is whether, under those circumstances, they were liable to pay the calls, or whether they were entitled to the benefit of the sets-off claimed.

Now the question as regards set-off has been the subject of judicial decision, and no doubt is a matter of the greatest import-

(1) Law Rep. 1 Ch. 528.
(2) Ibid. 8 Ch. 254.
(3) Ibid. 3 C. P. 175.
(4) Law Rep. 10 Eq. 312.
(5) 3 C. P. D. 282.
(6) Law Rep. 19 Eq. 449.
(7) Law Rep. 5 Eq. 214.

ance. On the one side there is an authority, which I must consider in point, cited on behalf of the contributories; and on the other side there are certain authorities cited—and to which I shall refer—questioning the soundness of that authority.

The case cited on behalf of the contributories was the case of the *Brighton Arcade Company* v. *Dowling* (1). The chief cases cited on behalf of the liquidator were the well-known case of *Grissell* (2) and the case of *Black & Co.* (3), which certainly throw very great doubt on the decision of the Court of Common Pleas.

On considering the matter, I came to the conclusion that it was open to me to decide the case, notwithstanding the case in point decided by the Court of Common Pleas, and notwithstanding that the case was decided ten years ago, and was a decision of the full Court of Common Pleas.

Now the real point, I think, should be first considered on principle; then I will consider one or two sections of the Act of Parliament, and then the authorities.

First of all, it must be remembered that at common law there was originally no right of set-off at all, and it was not till the statutes of set-off in the beginning of the reign of *George* II. that there was any such right established; and when we look at the terms of those Acts of Parliament—there were two of them (4) —it is plain they only applied to what was then an action at common law—and so it has been held—and that they only applied to the case of mutual debts, whatever they might be. That was followed by the Courts of Equity and extended; that is to say, certain cases were held to be within the equity of the statutes, although not within their actual words. Courts of Equity allowed set-off, but the Court of Equity, following the spirit of the statutes, would not allow a man to set off, even at law, where there was an equity to prevent his doing so; that is to say, where the rights, although legally mutual, were not equitably mutual.

That being the state of the law, it is obvious that when you have a demand at law to set off against a Plaintiff, it must be

(1) Law Rep. 3 C. P. 175.
(2) Ibid. 1 Ch. 528.
(3) Ibid. 8 Ch. 254.
(4) 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 4, 5.

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a demand of something due from the Plaintiff to the Defendant, otherwise there would be nothing to set off. If the claim against the Plaintiff were assigned or otherwise disposed of for value, the set-off would not arise at all; and the same principle applies in other cases where the legal demand is transferred or assigned. We have often had the well-known illustration of a bill of exchange indorsed over for value before it is due, so as no longer to be in the hands of the Defendant at the time of action brought. That being so, a question would immediately arise, if one of the parties became bankrupt, as to whether there was any set-off or not. In the case of bankruptcy the moneys due to the bankrupt before the bankruptcy would be distributable amongst the creditors and no longer payable to the bankrupt; and inasmuch as the Bankruptcy Acts enabled the assignee, who is now called a trustee, to sue in his own name—for he took under a legal assignment—of course, if he sued a Defendant, there was no debt due from him to the Defendant, although there might be a debt due from the bankrupt to the Defendant, and consequently, in terms, this form of set-off would not apply. It was to avoid that injustice that in the Bankruptcy Acts clauses of set-off were inserted, and which clauses are in fact rather wider than the Statutes of Set-off. I only observe upon that to shew that, in disposing of the bankrupt's rights as against his debtors, the Legislature found it necessary, in order to ascertain what should be included in the assets for the payment of creditors generally, to insert special provisions for set-off, otherwise there might be none.

So the law stood as regards individuals; and as regards companies there were several Acts of Parliament for winding them up, and finally the Act of 1862. Before going into the details of that Act, I may state the scheme of the Act as regards winding-up—which was this, that the assets of the company were to be collected by the liquidator and distributed among the creditors; and in the case of an insolvent company it was very like bankruptcy; but if the assets were to be so distributed, of course, if the liquidator sued in his own name, he would not be indebted at all to the man to whom the company was indebted, and there would be no strict right of set-off. Whether that was affected or not by the provisions of the Act that enabled him to sue in the name of the com-

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pany, I will consider further on. If he comes under those sections —notably the 138th section—in a voluntary winding-up, he comes in his own name as liquidator to enforce a call, and strictly speaking, there is no actual set-off, because he is not indebted.

If, therefore, you want a set-off at all, you must shew some provision in the Act itself giving the right of set-off, because in principle there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due. The two debts are not applicable to the same purposes, and could not properly be made the subject of set-off. Therefore it appears to me that the onus lies upon the man who says that there is this right of set-off to point out the provisions in the Act of Parliament giving that right.

Now, when we look at the Act of Parliament, which is the next thing I have to consider, it is plain there is no such right. First of all, it must be remembered that the 38th section of the Act, which directs what is to be paid in the case of a winding-up by the shareholders of a limited company, creates new rights, and rights which did not exist before the passing of the *Companies Act*, 1862, and rights which do not exist till there is a winding-up. That point was decided by the House of Lords in the case of *Webb* v. *Whiffin* (1), that it was in fact a new right, or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability.

When you come to look at the section you find that it applies to all kinds of winding-up; that is to say, to a winding-up by an order of the Court, to a winding-up voluntarily, and to a voluntary liquidation under the supervision of the Court; there is no distinction. The section says: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." That is a new liability; he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is no such thing. It is not,

(1) Law Rep. 5 H. L. 711.

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as has been supposed, in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator. It is quite true that a call made before the winding-up—and in the case before me a call was made before the winding-up—is a debt due to the company, but that does not affect this new liability to contribution.

But there are certain limits to the liability. This being a limited company, the only limit which it is necessary to refer to is that stated in the 4th sub-section of the 38th section: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." Now, first of all, as regards the calls made in the winding-up, they being calls for something unpaid on the shares, that is a contribution due by the member under the Act, and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding-up; because, though that is a debt due to the company, it is not the less an amount unpaid on the shares in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding-up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding-up. It seems to me that the contributories' liability created by the 38th section being only limited to the amount unpaid, it is immaterial, for the purpose of this section, whether the call was made before or after the winding-up, provided the amount is unpaid. That being so, it is a liability to contribute which, in the case of an ordinary winding-up, is of course enforceable by the Court; but so it is in a voluntary winding-up.

Then the 138th section of the Act says that the liquidator may apply to the Court "to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court;" and this summons is taken out under that section.

There is, therefore, no difference whatever; the liquidator may come to the Court in a voluntary winding-up, and say "Enforce the payment of the contributions due from the contributories under the 38th section."

It appears to me there is no possible distinction when you look at those two sections between the duty of the Court when applied to by a voluntary liquidator, and the duty of the Court when applied to by an official liquidator. If there is no debt due from the contributory to the company, how can he set off a debt due from the company to him against the contribution? It is a contribution to the assets enforceable by the liquidator, and not at all a debt. When you look at the Act there is really no question of set-off as between calls—that is, the amount unpaid on the shares—and a debt due by the company to the contributory.

Then there is one other section which I may refer to in addition to the sections that enable the liquidator to sue in the name of the company if he thinks fit. The 101st section—and I think it is the only section which deals in terms with this right of set-off—has an application to debts; but it does not at all interfere with the 38th section as to liability to contribution. The 101st section is this: "The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act." That excludes calls in the winding-up. It would include a call made before the winding-up. Then it goes on, "And it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit: Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any

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contributory from the company may be allowed to him by way of set-off against any subsequent call or calls."

Therefore this section empowers the Court to direct payment of any debt of the company, and it may allow, where the company is not limited, a set-off. Surely that does not allow the Court to do it where the company is limited. If there is any implication to be drawn from the section at all, it is that set-off is not to be allowed when the company is limited, though I do not think that is wanted, because, as I said before, I can see no ground on principle, on looking at the sections of the statute, for saying that there is a debt due from the contributory to the company, it being in fact the amount of his contribution to the assets for the benefit of the creditors.

So that when you look at the 101st section, so far as it goes it strengthens—if that was wanted—the proposition that there is no set-off to be allowed in the case of a limited company, for a sum of money due from the company to a person liable to the company. The proviso shews that when all the creditors are paid you may set off whether the company is limited or unlimited. Here, again, the inference is that you cannot do it before the creditors are paid. So that when you look at the wording of the 101st section, it is quite plain, as it appears to me, that, having regard to that section as well as the other sections of the Act, there is no ground for such a set-off as between the contribution under the 38th section, which includes calls made either before or after the winding-up—that is, anything unpaid on shares—and a debt due by the company to the contributory.

That being so on principle and on the construction of the Act, I must now look at the authorities, because they are somewhat difficult to deal with.

Now in the first case cited on behalf of the liquidator, *Grissell's Case* (1),—in which the company was being wound up under a supervision order—I cannot find any such distinction taken as was afterwards taken by the Court of Common Pleas between a winding-up under an order of the Court and a voluntary winding-up. It is laid down generally, that the shareholder who is also a creditor is not entitled to set off the debt due to him against the

(1) Law Rep. 1 Ch. 528.

calls made in the winding-up; but I cannot find in Lord *Chelmsford's* judgment any notion that a distinction should be made between a voluntary winding-up and a compulsory winding-up.

Of course the question before the Court being a question of contribution, was treated by Lord *Chelmsford* as one of contribution. He says (1), "The 75th section of the Act enacts, that the liability of any person to contribute to the assets of a company, in the event of its being wound up, 'shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability.' Until the call is made there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue due till a call is made. The power to make calls is only to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes." That shews the limit. The principle in *Grissell's Case* appears to me to cover the case of a voluntary winding-up as much as that of a compulsory winding-up.

The next case in order of date was *Calisher's Case* (2) which was decided a few days before the case before the Court of Common Pleas, and there Lord *Romilly* decided that you could not set off a debt due from the company to the contributory in the absence of special agreement. That latter part of the decision has been overruled, and it has been held that you cannot do so even by special agreement. But, subject to that, so far as the case before the Court went, Lord *Romilly* decided most distinctly that the Court could not, having regard to the terms of the 101st section and the decision of Lord *Chelmsford* in *Grissell's Case*, allow a contributory to set off a debt against a call.

The next case is the one which raises the whole difficulty; it is the case of the *Brighton Arcade Company* v. *Dowling* (3). The liquidator there brought an action for calls, and the full

(1) Law Rep. 1 Ch. 535. (2) Law Rep. 5 Eq. 214.
(3) Law Rep. 3 C. P. 175.

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Court of Common Pleas held that the debt due to the contributory from the company was to be set off against the call. The way in which it was put by the Court was this. Lord Chief Justice *Bovill* says (1): "Primâ facie there is a good debt disclosed by the declaration, and a good answer thereto by the fourth plea (of set-off). It lies therefore on the Plaintiffs to shew some law which prevents the application of the set-off."

Inasmuch as it appeared on the face of the action that it was a suit by the liquidator in the name of the company, it was not, as it appears to me, to be treated as if it was an action by the company whilst a going concern, and therefore the ground taken by the Court of Common Pleas fails, and under the provisions of the Act of 1862 there is no set-off—in other words, the obligation of proof is the other way. They assumed there was, under the statute, a right of set-off after the winding-up, unless you could shew it was taken away. There is no such right of set-off under the statute, where there is a contribution of this kind due to the assets of the company, and it is for those who allege set-off to shew it. His Lordship then proceeds to shew that there is an implication, if not an express prohibition, against such a plea, for he says, "If this had been the case of a company which was in course of being wound up by the Court or under the supervision of the Court, I should have had no hesitation in saying that the set-off could not be allowed." Therefore he does take the same view of the Act as I do, with one exception—that he thinks there is a difference in the case of a voluntary winding-up; but his attention was not called to the fact that you would then get this absurd consequence, namely, that under the 138th section the voluntary liquidator could apply for payment to the Court and the Court could exercise all the powers it could exercise under the winding-up; but the liquidator could not get the benefit of the Act, as regards payment by the contributory, in an action; and this extraordinary result would then follow, that he would get his demand, *minus* the set-off, in the action, and then come to the Court under the 138th section for the balance, namely, for that sum which the Court of Common Pleas say should be allowed by way of set-off—which would certainly be remarkable.

(1) Law Rep. 3 C. P. 179.

It was never intended by the Legislature that the liquidator should, if he chose to proceed by action, amend his action by an order under the 138th section, nor could it be argued that, there being the right under the 38th section to get the whole amount of contribution without set-off, there could be a less right in an action.

That being so, all the argument of the Court of Common Pleas appears to me fallacious. The powers of the Act of Parliament are enforceable on the application of a liquidator. If a company is insolvent a voluntary winding-up is more likely to take place than where a company is solvent; and can there be any reason for such a distinction as is alleged? If there were, you would have this consequence, that every case would have to be brought into Court as to a right of set-off. That is a consideration which it seems to me was not dealt with by the Court of Common Pleas. The whole of the judgments of the Judges of the full Court of Common Pleas proceed, as I said before, on the assumption that the Statute of Set-off applies unless the other side can shew a negative. I think if you examine the Act you can shew the negative, but I do not think it is necessary to shew the negative.

I should have gone into this matter more fully had it not been for the elaborate discussion which the matter received from Lord *Selborne* in *Black & Co.'s Case* (1). That was the case in which the Court overruled the distinction which Lord *Romilly* thought might exist of a special contract, but in the course of it there is an elaborate discussion by Lord *Selborne* of the case of the *Brighton Arcade Company* v. *Dowling* (2), and he so clearly points out his reasons that it would be a work of supererogation on my part to repeat what he has indicated; and I need hardly say I entirely agree with what he says on the subject.

I have only one other case to notice, which is *Gibbs and West's Case* (3), before Vice-Chancellor *Malins;* and there is only one observation of the Vice-Chancellor in that case to which it is necessary for me to refer. After discussing (4) the decision in *Grissell's Case,* he refers (5) to the *Brighton Arcade Company* v.

(1) Law Rep. 8 Ch. 254.
(2) Ibid. 3 C. P. 175.
(3) Law Rep. 10 Eq. 312.
(4) Ibid. 327.
(5) Law Rep. 10 Eq. 330.

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Dowling (1). He says, "I have been referred to the case of the *Brighton Arcade Company* v. *Dowling*, with regard to which I confess, after all that has been said upon it, and after all that learned Judges have said, I am unable to see that it is not in conflict with *Grissell's Case*, which has settled that, where the liability is limited, the right to set-off cannot exist."

I merely cite that to shew that at least one other Judge has considered that there is a direct conflict between the authorities; but I am not by citing that case to be supposed to agree with the decision in other respects. Indeed, the observations I have made shew that I could not agree with it. I cite it merely with reference to that observation.

That being so, I am in this position, that there is a decision of the Court of Common Pleas ten years old which is directly in point, and that decision, as I read it, is in conflict with a prior decision of the Lord Chancellor in *Grissell's Case* (2), and emphatically disapproved of by another Lord Chancellor in *Black & Co.'s Case* (3), and in conflict with the true interpretation of the Act of Parliament. It appears to me that, having regard to the rules by which Courts are bound, I am entitled to say that I am not bound by the decision of the Court of Common Pleas, and that I have a right to decide the case according to my own view of the Act of Parliament, confirmed as it is by the high authority of the two Lord Chancellors in the cases I have cited, and also by the opinion of Vice-Chancellor *Malins* as to the conflict of the case in the Common Pleas with the case of *Grissell*.

That being so, I think that no set-off exists in the present case, and there will therefore be an order against the contributories for payment of the call, and they must pay the costs of the application.

Solicitors for all parties: *Duignan & Smiles*, agents for *Duignan & Co., Walsall*.

(1) Law Rep. 3 C. P. 175. (2) Law Rep. 1 Ch. 528.
(3) Law Rep. 8 Ch. 254.

In re THOMPSON'S TRUSTS.

M. R.
1878
Aug. 3.

Will—Bequest to "the Heirs or Next of Kin of A., deceased"—Gift to one Class, not alternative Gift—Statutory Next of Kin.

Bequest of personalty to the heirs or next of kin of *A.*, deceased:—
Held to be a gift to one class, namely, the next of kin of *A.*, according to the statute.

Statement.

THIS was a petition for the payment out of Court of a trust fund paid in under the *Trustee Relief Act* by the executors of *Ann Thompson*, deceased.

The testatrix by her will, dated the 23rd of April, 1869, devised and bequeathed her leasehold houses and all other her real and personal estate to her executors, in trust for her nephew *William Lodge* for his life, and after his decease she directed the trustees to sell the same and stand possessed of the proceeds in trust to pay certain legacies, and as to the residue "in trust to divide the same into three equal parts, and pay the same as follows, namely, one third part to the heirs or next to kin of *Thomas Lodge*, deceased; one third part to the heirs or next of kin of *John Lodge*, deceased; one third part to the heirs or next of kin of *Milburn Lodge*, deceased.

The testatrix died in 1870, the said *Thomas Lodge*, *John Lodge*, and *Milburn Lodge*, having all predeceased her.

William Lodge died in 1874, and the proceeds of the sale of the property, after the other purposes of the will had been satisfied, were paid into Court.

The present Petitioners were *John Sampson Lodge* and *Margaret Hannah Lodge*.

John Sampson Lodge claimed to be entitled to one third of the fund as heir-at-law of *John Lodge*, and also as his nearest of kin and his sole next of kin according to the statute.

Margaret Hannah Lodge claimed to be entitled to one other third as heiress-at-law of *Thomas Lodge*, and also as his nearest of kin; also she and her mother (since deceased) were his sole next of kin according to the statute.

The petition prayed that one third of the fund might be paid to

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John Sampson Lodge, that one other third might be paid to *Margaret Hannah Lodge*, and that the remaining third might be carried over to the account of the share of the next of kin of *Milburn Lodge*.

Argument.

Cracknall, for the Petitioners.

Herbert Percival, for *Henry William Lodge*, one of the next of kin of the testatrix:—

The gift is void for uncertainty. A bequest of personalty to the "heirs" of an individual goes to such heirs as *personæ designatæ*, or to the statutory next of kin, as in the case of *In re Steevens' Trusts* (1). A gift to the "next of kin" of an individual without more goes to the nearest blood relations as joint tenants. Whichever construction is put on the word "heirs" in this gift, the persons taking under it are distinct from those taking under the words "next of kin." In *Lowndes* v. *Stone* (2), a gift to a testator's "next of kin or heir-at-law" was held to be void for uncertainty.

[JESSEL, M.R.:—In that case the word was "heir-at-law," Here she speaks of "heirs" as a class which seems to shew that she looked upon the heirs and next of kin as being the same class.]

I submit that the principle of that case is applicable here, and that the next of kin of the testatrix are entitled to the fund.

Philpotts, for the executors of the heir-at-law of *Milburn Lodge*, who was also one of his two nearest of kin as well as one of his three statutory next of kin:—

I contend, first, that the heir-at-law took as being the person to whom the whole description of "heirs and next of kin" applied. There is no one else who answers the whole description. If that contention fails, then I contend that the only way to avoid uncertainty is to read "or" as "and" on the principle on which *Eccard* v. *Brooke* (3) was decided, where in a gift "to *A.* or her children," "or" was read "and" to prevent the gift from being void for uncertainty.

(1) Law Rep. 15 Eq. 110. (2) 4 Ves. 649. (3) 2 Cox, 213.

O. A. Saunders, for another of the three statutory next of kin of *Milburn Lodge.*

W. D. Rawlins, for the trustees.

Judgment.

JESSEL, M.R.:—

I think that the rational construction to put on this will is this, that the testatrix meant, not to make an alternative gift, but that both the terms "next of kin" and "heirs" should apply to one class. That being so, the next question is, what is the class designated? She gives her real and personal estate to trustees in trust for her nephew for life, and after his death in trust for sale, and after payment of legacies, as to the residue, to pay "one third to the heirs or next of kin of *Thomas Lodge,* deceased; one third to the heirs or next of kin of *John Lodge,* deceased; and one third to the heirs or next of kin of *Milburn Lodge,* deceased." She describes these persons as "deceased," shewing that she knows they are all dead, and she gives to a class described as "the heirs or next of kin" of each. Is there such a class as this who, in a gift of personal estate, can be thus described? There is such a class, for as regards personal estate the word "heirs" is used for statutory next of kin, and as the testatrix meant both descriptions to apply to the same class, it follows that the gift is in favour of the statutory next of kin of the three persons named. The Petitioner *John Sampson Lodge* is entitled to one third; the Petitioner *Margaret Hannah Lodge* to another third; and the next of kin of *Milburn Lodge,* according to the statute, to the remaining third.

Solicitors: *Clarke, Rawlins, & Clarke,* agents for *Moore, South Shields.*

M. R.
1878
Aug. 6.

PULBROOK *v.* RICHMOND CONSOLIDATED MINING COMPANY.

[1878 P. 166.]

Company—Director, Exclusion of—Injunction—Qualification—Trust Shares—Shares held "in his own right."

21 CLD 188
23 CLD 21-4
31-8-41

A director of a company can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as director.

Where the articles of association of a company provided that no person should be eligible as a director unless he held "as registered member in his own right capital of the nominal value of £500 at least":—

Held, that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, though he had transferred his shares to another, was properly eligible.

Statement.

THIS was a motion to restrain the directors of the Defendant company from restraining or in any way interfering with the Plaintiff's acting as a director of the company.

The articles of association of the company provided as follows:—

Art. 54. "No person shall be eligible as a director unless he holds as registered member in his own right capital of the nominal value of £500 at least."

Art. 65. "A director is to vacate his office if at any time he holds less than the nominal amount of capital required as his qualification for election."

On the 23rd of August, 1877, the Plaintiff, whose name appeared on the register of the company as the holder of 100 shares in the capital of the company of the nominal value of £500, was elected a director.

Prior to his election, in January, 1877, the Plaintiff had executed a deed of transfer of his shares to *William Cuthbert*, as he alleged, by way of mortgage as a security for money borrowed on his shares, and it was agreed between them that the transfer should not be registered.

On the 18th of January, 1878, *Cuthbert*, through mistake as the Plaintiff alleged, took the transfer to the secretary of the company, who registered the same and inserted *Cuthbert's* name as the holder of the shares transferred to him by the Plaintiff.

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Notice of this entry on the register having been given to the directors, the Plaintiff was not allowed to take his seat at the board. The Plaintiff thereupon took out a summons in the Common Pleas Division to rectify the register, and by an order of Mr. Justice *Field* of the 1st of March, 1878, the name of *Cuthbert* was ordered to be struck out as the transferee of the said shares and the name of *Pulbrook* inserted as the holder of the same. On the 20th of June, 1878, this order was affirmed on appeal by the Divisional Court, the Plaintiff undertaking not to question any of the prior acts of the directors.

On the 25th of June, 1878, the Plaintiff took his seat at the board and produced the order, but the other directors refused to permit him to act, whereupon he brought his action against the company and the other directors. The present motion was made to restrain the directors by injunction from thus interfering with his rights.

Argument.

Chitty, Q.C., *Brooksbank*, and *Boome*, in support of the motion:—

The Plaintiff in this case was duly elected a director, and was qualified under clause 54 of the articles of association. The fact of his having mortgaged his shares does not affect his qualification, as the provision that "no person shall be eligible unless he holds in his own right capital of the nominal value of £500" does not mean that he shall be necessarily beneficial owner of the shares. The Court will not look behind the register. By sect. 30 of the *Companies Act* it is provided that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register." The transfer to *Cuthbert* was registered by mistake, and the Plaintiff's name having been restored by the order of Mr. Justice *Field*, affirmed by the Divisional Court, he cannot be held to have vacated his seat under clause 65. The Plaintiff has sustained an individual wrong by being now excluded from the board, and is entitled to maintain his action and to restrain the other directors from preventing him from acting.

Davey, Q.C., and *W. Barber*, for the other directors:—

This action is not properly brought. An individual director cannot thus sue the other directors. If a wrongful act has been

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committed the action should be brought in the name of the company. When the company is injured by the improper exclusion of a director from the board the company is the proper party to sue. Besides, the Plaintiff was not at the time of his election the holder in his own right of capital of the value of £500. He had previously transferred his shares, and, though it is alleged that he only transferred them by way of mortgage, there is nothing to shew that he had not transferred them out and out. When that transfer was registered he ceased even to be the ostensible holder of the shares, and under clause 65 he was bound to vacate his office. The fact of his name being restored to the register by the order of the Court of Common Pleas does not entitle him to take his seat as a director, and the other directors cannot be restrained from excluding him from the board.

[*Pender* v. *Lushington* (1) and *MacDougall* v. *Gardiner* (2) were referred to.]

Judgment.

JESSEL, M.R.:—

This is a motion which raises some points of great importance.

The first question is, whether a director who is improperly and without cause excluded by his brother directors from the board from which they claim the right to exclude him, is entitled to an order restraining his brother directors from so excluding him.

In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

(1) 6 Ch. D. 70. (2) 1 Ch. D. 13.

Besides that, he is in the position of a shareholder, of a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his services. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and those decisions which say that, where a wrong is done to the company by the exclusion of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual. There may be cases where, by preventing a director from exercising his functions in addition to its being a wrong done to the individual, a wrong is also done to the company, and there the company have a right to complain. But in a case of an individual wrong, another shareholder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong. That being so, in my opinion, the Plaintiff in this case has a right of action.

In the next place, assuming him to have a right of action, has he a right to restrain his brother directors from acting without him? That must depend on the question whether he is a director properly elected.

Now, it does not appear to me in this case that the company has any power to remove him. They certainly have not exercised it. Therefore if he were elected a director, and has remained a director, he ought to be allowed to exercise his functions as a director. That he was validly elected in August, 1877, is not disputed; his period of office has not expired, and at the time he was elected he had the qualification of holding capital of the nominal value of £500. But it is said that before his election he had executed a deed of transfer to one *Cuthbert* of these shares. On the one side it is said that the transfer was executed by way of mortgage, and on the other side it is said that there is nothing to shew that it was so.

The words of the 54th clause in the articles of association are: "No person shall be eligible as a director unless he holds as registered member in his own right capital of the company of the nominal value of £500 at least." When it says, "No person shall

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be eligible," that does not necessarily vacate the election if it takes place, for although improperly elected he might still be *de facto* a director, though not *de jure* a director.

Then the 65th clause says, "A director shall vacate his office if he at any time hold less than the nominal amount of capital required as his qualification for election." It does not repeat the words in the 54th clause, "in his own right," so that that does not in form make him vacate his office. But it may be that the election was void when you take the two clauses together, and that, upon this being discovered, you might put somebody else in his place. Then it comes to this: what is the meaning of the words "in his own right"? He is to hold "as registered member in his own right;" what then is the meaning of "registered member"? Under the terms of the Act of 25 & 26 Vict. c. 89, s. 30, I find these words, "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar, in the case of companies under this Act." So that it cannot appear on the register itself that he holds the shares in trust, but he is to hold as a "registered member." Therefore, when you come to see those words, that it cannot appear on the register, and that you are to find out on the register whether he is a "registered member in his own right," it cannot mean that he is to be beneficial owner. It must have some meaning. What does it mean?

There are provisions in the Act of Parliament, and indeed in these articles of association, for persons who do not hold in their own right being registered members. I will read one of them, the 17th, which is this, "Any person becoming entitled to a registered share in consequence of the death or bankruptcy of any member, or in consequence of the marriage of any female, may be registered a member in respect of such shares, or without being so registered, may transfer the share;" and the 16th clause says, "The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to a share registered in the name of such member." Therefore, under the combined effect of these two clauses, a man may be registered as executor or as administrator, or as trustee in bankruptcy, or as the husband of a lady herself a shareholder.

Therefore there are at least three separate classes of persons who may be registered, and who will not be registered as members in their own right, but in the right of other persons. Others might so hold shares, such as committees, and guardians of infants and of persons of unsound mind. The company cannot look behind the register as to the beneficial interest, but must take the register as conclusive, and cannot inquire, either for this purpose, or indeed for any other, into the trusts affecting the shares. That being so, in my opinion, whether or not there was an absolute trust, or whether Mr. *Cuthbert* was only the mortgagee, is not material; Mr. *Pulbrook* was well elected, and if nothing else had occurred he would undoubtedly have continued a director. But something else occurred.

After Mr. *Pulbrook* had been some time a director, Mr. *Cuthbert*, through some mistake took the transfer to the secretary of the company, who duly registered it. It seems the fact was brought before the directors. That being so, an application was made to Mr. Justice *Field* at Chambers, under the 35th section of the *Companies Act*, to rectify the register. It would ill become me to make any observation upon that decision of Mr. Justice *Field*. It is not for me to say whether I should have come to the same decision or not. I am bound by it. I shall not comment upon it further than to say I am bound by it. The order was: "That the *Richmond Consolidation Mining Company, Limited*, do rectify the register of members of the said company by striking out the name of *William Cuthbert* therefrom, as the transferee of 100 shares from *Anthony Pulbrook*." That order was appealed from to the Divisional Court and affirmed. So there are two decisions of two Courts on the same point in the same matter. The result is that, rightly or wrongly, but I am bound for this purpose to assume rightly, the name of Mr. *Cuthbert* has been struck out of the register and the register rectified. The effect of that is exactly the same as if it had never been put in. That is the meaning of "rectified." You strike it out by way of rectification, and the Court has therefore declared that it ought never to have been entered at all. They have struck it out from the beginning.

The result is, so far as regards registration of that transfer, there is no registration, and never was for this purpose, and con-

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sequently Mr. *Pulbrook* remains rightly a director. I see that the Divisional Court took an undertaking from him not to question the interim acts of the directors. Therefore he cannot complain of anything that was done in his absence not having been duly done. Whether he could have complained is quite another question. It appears to me that Mr. *Pulbrook* is a director, lawfully elected, and that he has not vacated his office. Therefore I think he is entitled to an injunction to restrain the directors as asked.

Solicitors: *A. Pulbrook; H. W. Vallance.*

M. R. 1878 Aug. 7.

HARBORD *v.* MONK.

[1870 H. 160.]

Practice—Discovery—Delivery of Interrogatories by Plaintiff before Statement of Defence—Rules of Court, 1875, *Order* XXXI., *r.* 5.

13 Ch D. 140

In an action in the Chancery Division interrogatories may be delivered before the statement of defence.

Mercier v. *Cotton* (1) applies only to actions in the nature of Common Law actions.

Statement.

ADJOURNED SUMMONS.

This was an application by the Defendant that the Plaintiff might be ordered to amend his statement of claim in certain particulars mentioned.

The action was brought by a stockbroker against his customer to open accounts, and the statement of claim, which sought discovery, contained certain general charges of fraud. A similar action between the same parties had been brought in another branch of the Court before Vice-Chancellor *Bacon*, and since discontinued.

Argument.

Roxburgh, Q.C., and *Chester*, for the Defendant, in support of the application.

Davey, Q.C., and *Oswald*, for the Plaintiff, *contrà*.

(1) 1 Q. B. D. 442.

(1) Ex. 1878/102.

In the course of the argument the Master of the Rolls suggested that the difficulties which had been raised on each side might be met by giving each party liberty to interrogate the other.

Argument.

Davey submitted whether interrogatories could properly be delivered by the Plaintiff at that stage of the action and before the statement of defence was delivered. He referred to *Mercier* v. *Cotton* (1) where, on an appeal from the Queen's Bench Division, the Court of Appeal had held that, when interrogatories were delivered by a Plaintiff before the statement of defence had been delivered, they might be ordered to be struck out under Rules of Court, 1875, Order XXXI., rule 5, unless sufficient reason were given by the Plaintiff to shew that the interrogatories were necessary at that period of the action.

Judgment.

JESSEL, M.R.:—

It has never been the practice in the Chancery Division to delay discovery by not allowing the Plaintiff on delivery of his statement of claim to deliver interrogatories till the statement of defence has been delivered.

The case of *Mercier* v. *Cotton* is obviously limited to actions in the nature of common law actions. It has no application to actions in the Chancery Division. In a common law action if a Plaintiff exhibits interrogatories at the time of delivering his statement of claim under Order XXXI., rule 1, he must justify them, if required, under rule 5; but in an ordinary action in the Chancery Division the interrogatories justify themselves.

In this case I will give liberty to both parties to deliver interrogatories; the statement of defence not to be put in till the Plaintiff has answered the Defendant's interrogatories; the case to stand over generally till the interrogatories are answered.

Solicitors: *Harcourt & Macarthur; Crook & Smith.*

(1) 1 Q. B. D. 442.

M. R.
1878
Aug. 8.

In re BRANDRETH'S TRADE-MARK.

Practice—Trade-Mark—Opposing Registration—"Case standing for Determination of Court"—Trade Marks Registration Acts, 1875–1877—*Trade-Marks Rules*, 1876, *r.* 16—*Costs of Proceedings before Registrar of Trade-Marks—Jurisdiction of Court to order Payment of—"Costs of and incident to Proceedings in High Court"—Rules of Court*, 1875, *Order* LV.

11 Ch D 675

"The costs of and incident to all proceedings in the High Court" (Rules of Court, 1875, Order LV.), means the costs of and incident to all proceedings that have actually come into the High Court.

A case under the Trade Marks Registration Acts, 1875–1877, does not "stand for the determination of the Court," within the 16th Rule of the Trade-Marks Rules, 1876, until the parties opposing registration have given security for costs as provided by that rule.

Upon an application by summons for the registration of a trade-mark being refused with costs, the Court, in exercising the discretionary power given to it by Rules of Court, 1875, Order LV., as to the costs "of and incident to all proceedings in the High Court," has only jurisdiction to order the payment of costs incurred since the case "stood for the determination of the Court" under the Trade-Marks Rules, 1876, r. 16, that is, from the time of the parties opposing registration giving security for costs as provided by that rule, and has no power to order payment of the costs of the previous proceedings before the Registrar of Trade-Marks.

Statement.

AN application to his Lordship, by adjourned summons, for the registration of a trade-mark, having been refused with costs, a question arose whether the Court had jurisdiction to order the applicant to pay, in addition to the costs of the summons, the costs of the parties opposing the registration incurred before the Registrar of Trade-Marks prior to the issue of the summons from the Judge's Chambers.

Argument.

Aston, Q.C., and *Chadwyck Healey*, for the applicant:—

We do not dispute the power of the Court to order us to pay the costs incurred by our opponents since the time the summons was taken out, but we submit that the Court cannot take cognizance of proceedings in the Registrar's office which might have proved abortive and never have come before the Court at all.

Chitty, Q.C., and *T. L. Wilkinson*, for the persons opposing the application:—

We submit that when the case once comes before the Court, the

whole of the proceedings, including those before the Registrar, should be deemed one set of proceedings, and therefore subject to the jurisdiction of the Court as to costs.

JESSEL, M.R.:—

The Rules of Court, 1875, Order LV., provide that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court:" that is, the Court has only a discretion as to costs of proceedings that have actually come into the High Court.

The moment, therefore, a case under the Trade Marks Registration Acts comes into the High Court, there is no doubt the Court has jurisdiction as to costs from that time, but proceedings in the Registrar's office are not "proceedings in the High Court."

It seems to me the 16th rule of the Trade-Marks Rules, 1876, is the only rule applicable to the case, and upon the construction of that rule I hold that, upon the opponents giving security for costs as therein provided, the case then, and not till then, "stood for the determination of the Court," and accordingly that the Court must confine itself to ordering the applicant to pay his opponents' costs from that time.

Solicitors: *F. Venn & Son; Thomson, Lidiard, & Co.*

V.-C. M.
1878
June 25.

HILTON *v.* JONES.

[1878 H. 73.]

Date of Statute—Operation of Statute—Judicature Act, 1873, *s.* 25, *sub-s.* 1.

Sub-sect. 1 of the *Judicature Act*, 1873, came into operation on the passing of the Act.

A testator died on the 15th of May, 1875, and an order for the administration of his estate was made on the 22nd of June, 1875:—

Held, that the rights of a secured creditor were governed by sect. 25, sub-sect. 1, of the Act of 1873.

Overruled by Chetcroft 12 Ch D. 68

Statement.

THIS was an adjourned summons taken out by a secured creditor, who claimed to prove in the suit for the full amount of his debt without allowing for the moneys realized by him from his security.

D. Richards, the testator in the cause, died on the 15th day of May, 1875, and an order for administration of his estate was made upon a summons on the 22nd of June, 1875.

Under these circumstances the question arose whether the estate ought to be administered under the provisions of the 25th section of the *Judicature Act*, 1873, sub-s. 1.

The creditor's contention was that the case ought to be decided according to the law as it existed before the Judicature Acts.

The *Judicature Act*, 1873, was passed on the 5th of August, 1873, but was not to come into operation until the 2nd of November, 1874.

By the suspending Act of 1874 it was enacted that the Act of 1873 should not come into operation until the 1st of November, 1875, excepting such provisions as were directed to take effect upon the passing of the Act.

The 1st sub-section of the 25th section of the Act of 1873 was re-enacted and slightly extended by the Act of 1875.

Argument.

Dundas Gardiner, for the creditor:—

This section came into operation at the date of the passing of the Act of 1873, *i.e.*, on the 5th of August, 1873, and was not suspended by the Act of 1874.

The litigation must be determined by the law existing when it commenced, *i.e.*, by the law under the Act of 1873: *Barton Regis Union* v. *Overseers of Liverpool* (1).

J. Pearson, Q.C., and *Romer*, for the summons:—

The Act of 1873 (excepting a few sections, as to which it was specially enacted that they should come into operation immediately) was not to come into operation until the 2nd of November, 1874.

Then the suspending Act of 1874 delayed the coming into operation of the Act of 1873 until the 1st of November, 1875.

It is particularly declared by the preamble to the 25th section of the Act of 1873, that "it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the High Court to amend and declare the law to be hereafter administered as to the matters next hereinafter mentioned," which can only mean that this section, as well as others, was not intended to take effect until the body of the Act came into operation, and it was stayed by the Act of 1874, with the rest of the Act of 1873. Therefore the old rule, as laid down in *Mason* v. *Bogg* (2), ought to be applied to this case, unaffected by the Judicature Acts.

There is no provision at the end of sect. 25 that that section was to come into operation at the passing of the Act, though at the end of other sections there is such a provision.

Mr. *Wilson*, in his second edition of the Judicature Acts, states that the sub-section came into operation on the 1st of November, 1875, and quotes *Phœnix Bessemer Steam Company* (3) to shew that sect. 10 of the Act of 1875, which re-enacts the 21st section of the Act of 1873, is not in any way retrospective. Sub-sect. 7 of the same sect. 25 was dealt with in *Noble* v. *Edwardes* (4).

[MALINS, V.C.:—In that sub-section the words "who may die after the passing of this Act" do not appear.]

Goldie, for the Defendant.

(1) 3 Q. B. D. 295, 298.
(2) 2 My. & Cr. 443.
(3) 24 W. R. 19.
(4) 5 Ch. D. 378.

V.-C. M. 1878 HILTON v. JONES. Judgment.

MALINS, V.C.:—

I am of opinion that the just and equitable rule enacted by the Legislature in the 25th section of the Act of 1873 applies to this case, and that section provides that, in the administration by the Court of the assets of any person who may die on or after the passing of the Act, that is, after the 5th of August, 1873, the new rule shall apply.

No doubt the 2nd section of the Act of 1873 suspended the coming into operation of the greater part of the Act until the 2nd of November, 1874, which period was afterwards extended until the 1st of November, 1875; but the 25th section must from the very wording of it apply to the estates of persons dying on any day after the passing of the Act.

12 Ch D 70

The suspending Act of 1874, in postponing the operation of the Act of 1873, excepted any provision directed to take effect upon the passing of the Act, and I must hold that this 25th section, being a provision substantially directed to take effect upon the passing of the Act, was not suspended by the Act of 1874.

Therefore I cannot concur in the opinion of Mr. *Wilson*, stated in the second edition of his work (1), and I hold that the 25th section of the Act of 1873 applies to the case before me (2).

Solicitors: *Dangerfield & Blythe*; *Torr & Co.*

(1) Page 26.

(2) August 6, 1878. The case was brought before the Court of Appeal, but further facts which were disclosed rendered it unnecessary for the Court to express any opinion on the point decided by the Vice-Chancellor. The appeal was dismissed.

NORTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

V.-C. M.
1878
July 8, 9, 10, 15.

[1875 N. 13a.]

Railway Company—Adjoining Landowner—Easement over Railway—Superfluous Land—Abandonment.

A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway.

A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway.

A railway company is liable to an action for nuisance for using their rights so as to injure the neighbouring landowner where they might use them without such injury.

A railway company may by their conduct abandon land outside their fence which was formerly theirs, so as to permit the adjoining owner to acquire such land by adverse possession.

Statement.

THE *London and Birmingham Railway* (which had been taken over by the Defendants, the *London and North Western Railway Company*) was made under an Act which contained provisions similar to those afterwards embodied in the Lands Clauses Acts.

In 1833 the *London and Birmingham Railway* took from Sir *Charles Adderley* land at *Saltley*, near *Birmingham*, for the purposes of their railway, and the land was conveyed to the company in fee simple by a deed containing the following general words: "Together with all coal, and other mines and minerals, and all easements connected therewith, and all right or title in me or any persons whom I can bind or affect, to cut or make any airways, headways, gateways, or water levels through or in any of the hereditaments or strata hereby conveyed, together with all ways, rights, and appurtenances thereto belonging."

In 1860 Sir *Charles Adderley* granted a lease to the Plaintiff, *Thomas Norton*, of a piece of land on the northern side of the railway, where it ran through Sir *Charles's* land, for a term of ninety-nine years; and the land demised was described as "adjoining on the southern side thereof to the *London and North Western Railway*."

V.-C. M. 1878 NORTON v. LONDON AND NORTH WESTERN RAILWAY CO. Statement.

On this land so demised to him the Plaintiff at once proceeded to erect an inn or public-house called the *Station Hotel*. The front of the house opened upon a road, but the back part looked over the line of railway, and the seven windows at the back derived their light and air from over the railway. The Plaintiff had full enjoyment of his house unquestioned by the railway company till the year 1874, when the company erected a signal-box, which was used for the purpose of working the line of rails. The smoke from the chimney belonging to the signal-box was blown into the Plaintiff's windows, and one object of this action was to obtain damages for this nuisance. The Plaintiff made a complaint to the authorities of the railway company respecting the smoke, and subsequently the signal-box was removed. The railway company shortly afterwards claimed a rent from Mr. *Norton* for the privilege of uninterrupted light and air across their railway. This claim was refused, and thereupon the company erected a large hoarding directly in front of the Plaintiff's house and within one foot of his windows, whereby the light and air were almost entirely excluded. The company persisted in retaining the hoarding for a period of six months, until, in December, 1875, it was accidentally blown down by the wind, but the company still claimed the right to shut out the light from the Plaintiff's windows, on the ground that they were justified in preventing adjoining landowners from acquiring easements over the line of railway which might prevent the railway company from afterwards erecting a building or station for the purpose of the railway

The railway company, by way of counter-claim, contended that they were entitled to a small strip of land immediately outside the hedge bounding the company's railway. As to this, it appeared by evidence that it is the practice of railway companies first to erect a post and rail fence at the extreme outside of the land taken for their line, then to plant and rear a quick-fence at a convenient distance within their boundary as a permanent fence, and to occupy the distance intervening between the outside post and rail fence and the quick-fence with a ditch for the protection of the quick-fence.

The railway company contended that a strip of land in the Plaintiff's occupation outside their present quick-fence, had for-

merly been the ditch of the company, and was still the company's property. But the Plaintiff produced evidence (which the Court believed) that there had never been any such ditch, and also contended that if there ever had been one, the strip of land had been abandoned by the company, and the Plaintiff's lessor was entitled to it either as superfluous land, or, under the *Statute of Limitations*, by reason of adverse possession.

Argument.

J. Pearson, Q.C., and *Romer*, for the Plaintiff:—

A railway company has no right to block up the lights of an adjoining landowner, so as to prevent him from acquiring an easement over the railway.

The ownership which the railway company has of its lands is a limited fee simple confined to the public objects of the railway: *United Land Company* v. *Great Eastern Railway Company* (1); *Bostock* v. *North Staffordshire Railway Company* (2). The adjoining landowners do not receive compensation calculated on the assumption that they can be built out and their light and air obstructed by the railway company.

As to the smoke, the company ought to have used the cabin in such a way as not to annoy the Plaintiff: *Fenwick* v. *East London Railway Company* (3). As to the piece of land claimed by the company, we say they abandoned it under sect. 127 of the *Lands Clauses Act*. It is implied that all the land which is left outside the company's fence belongs to the adjoining landowner under 5 & 6 Vict. c. 55, s. 10, and sect. 16 of the *Railways Act*, 1845, which provide for the fencing of the railway.

Glasse, Q.C., *Speed*, and *Dugdale*, for the railway company:—

A conveyance of property to a company passes to the company all the rights and incidents belonging to that property: *Swindon Waterworks Company* v. *Wilts and Berks Navigation Company* (4). Is the company to be deprived of their right to erect a station at a given place because somebody may have built a small cottage there overlooking the railway?

(1) Law Rep. 17 Eq. 158; Ibid. 10 Ch. 586.
(2) 5 De G. & Sm. 584; 4 E. & B. 798; 3 Sm. & Giff. 283.
(3) Law Rep. 20 Eq. 544.
(4) Ibid. 7 H. L. 697, 706.

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Argument.

The presumption is that the ditch was upon the company's land: *Vowles* v. *Miller* (1); *Doe* v. *Pearsey* (2). We have a right to prevent the Plaintiff acquiring an easement against us: *Blanchard* v. *Bridges* (3).

The company may prevent adjoining owners from acquiring prescriptive rights which will prevent them from building where they are likely to want to build.

The Court must assume that the company will act reasonably: *Odessa Tramways Company* v. *Mendel* (4).

As to the strip of land, we prove it was once a ditch belonging to the company, and the right of the company to the strip of land is not barred by lapse of time: *Searby* v. *Tottenham Railway Company* (5). This is not superfluous land: *Betts* v. *Great Eastern Railway Company* (6).

The Plaintiff has not acquired any title under the *Statute of Limitations*. There have been no acts of adverse possession: *Searby* v. *Tottenham Railway Company*. The title which the Plaintiff sets up can be referred to a lawful title under his lease: *Thomas* v. *Thomas* (7).

Land of this description cannot be treated as superfluous land: *Betts* v. *Great Eastern Railway Company* (8). There Chief Baron *Kelly* says that mere non-user of land for a considerable time does not make the land superfluous: *Hooper* v. *Bourne* (9).

Judgment.

MALINS, V.C.:—

The questions raised in this case are of the greatest possible importance to the public, and, if the claim could be sustained, would, in my opinion, put the public in a most unfortunate position with regard to the exercise of rights of ownership over the lands adjoining railways.

[After stating the facts of the case his Lordship continued:—]

The railway company demanded a rent from the Plaintiff because, they said, twelve years have elapsed since these windows

(1) 3 Taunt. 137.
(2) 7 B. & C. 304, 307.
(3) 4 A. & E. 176.
(4) 8 Ch. D. 235, 247.
(5) Law Rep. 5 Eq. 409.
(6) 3 Ex. D. 182.
(7) 2 K. & J. 79, 83.
(8) Law Rep. 8 Ex. 294.
(9) 3 Q. B. D. 258, 274.

were opened, and if we allow it to go on for eight years longer, an adverse right will be acquired of looking across the railway; we must protect ourselves. And they still claim the right, and continue to demand a rent for the use of those windows looking across the railway. I hope the result of this case will be to teach the railway company that they have no right to claim such rents, for I am of opinion that such rents are utterly illegal and uncalled for, and that the company has no such right to darken windows which overlook their line.

It has not been disputed, that if a person build upon land contiguous to the land of another, and opens windows overlooking that land, the proprietor of the adjoining land may, at any time within twenty years from the opening of the windows looking over his land, put a hoarding before it so as to stop those windows. If a man erects a building looking over my land or my house I have an immediate right to say, This is not an ancient window, I cannot prevent the making of the window, but I will, as close as possible without touching it, put a hoarding so that the window may not look into my garden, or over my land.

If this railway company had been the absolute owners of this property, they might have demanded a rent from Mr. *Norton* for the privilege of looking over the land, and if he refused to pay them, they would be entitled by law to erect a hoarding as they did; but the question is whether they being a railway company have any such rights, and I am clearly of opinion that they have no such right.

It is necessary to consider what are the rights which railway companies acquire in land which they take for the purpose of constructing their railway. That they acquire the absolute fee simple of the land is not in dispute. I am clearly of opinion that every railway company taking land for the purpose of constructing, maintaining, and using their railway, have the fee simple of all the land which they are authorized to take, and they have a right to exclude all other persons entering upon that land without permission; but they have it in that qualified manner in which land taken for particular purposes is taken.

Now this has been the subject of adjudication, particularly in a case which I decided, and which I should refer to with much

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more diffidence than I do if it had not been that everything I decided was affirmed by the Court of Appeal. I refer to the case of *United Land Company* v. *Great Eastern Railway Company* (1). There a railway company acquired land and took it, subject to three level crossings. The land at that time on one side of the railway was mud land. It was very improbable that it could ever be applicable for building purposes, but afterwards the Plaintiffs, the *United Land Company*, erected many houses there, and in order to get to the houses it was necessary to use the railway, and they could only use it as the law had provided them the means of using it by these level crossings. Now, this was very disagreeable to the railway company. They did not like to have so much traffic over their railway, and therefore they raised this contention, that although you may use these level crossings, you can only use them for the purposes to which the land was applied when the right to cross was given. But I had occasion then to go into the question what was the position of the railway company with regard to land acquired for the purpose of the railway, and what was the position of the landowner with regard to that which he had parted with under the compulsory power, and which the railway company had taken. All that I said in that case was affirmed by the Court of Appeal. It appears to me that this case has a most precise bearing upon the question, and in fact decides the question that is now before me. I said in that case (2), "But at the same time that the Legislature throws upon individuals the obligation of parting with their land it protects them as far as possible by obliging the company taking it for the purpose of constructing the railway to make such communication as shall either be agreed upon, or be prescribed by the particular Act of Parliament, or be settled by the tribunal appointed for the purpose. Therefore, when one part of an estate is severed from another by a railway, it is always a condition that sufficient communication shall be made either over the railway by a bridge, under the railway by an arch, or across it by a level crossing. But I apprehend that, whatever be the mode of communication, the object is that the rights of the landowner shall be in no way prejudiced, except so far as is required for the actual construction of the railway. He is to have as much enjoy-

(1) Law Rep. 17 Eq. 158. (2) Law Rep. 17 Eq. 165.

ment and as free use of his land after the railway is constructed as he had before, so far as the exercise of those rights does not interfere with the rights of the railway company, and the rights of the public in running over the lands upon the railway."

Now, that I am right in the rule which I laid down there is shewn by the confirmation of it by the Court of Appeal; therefore the law is correctly stated that the owner of the adjoining land has the same rights in the estate which is not taken, that he would have had if the railway had not been constructed, and surely among those rights must be the right of erecting a building with windows in it looking over the railway, just as he would have had the right to erect a building on the same spot looking over his own estate; this part ceasing to be his own estate only for the purpose for which it was acquired, namely, for the purpose of making, constructing, and using the railway.

In the Court of appeal Lord Justice *James* says this (1): "I am of opinion that the decree of the Vice-Chancellor in this case is perfectly right. The land belonged to the Crown, and a clause was inserted in an Act of Parliament that the railway company were to make such communications for the convenient enjoyment of the land as the Commissioners of Woods and Forests should in their judgment think necessary. It seems to me impossible to say that that clause involves a restriction that the communication is to be only such as they shall think necessary for the convenient enjoyment and occupation of the lands exactly in their present state, and for their present purposes, and for no others. The object was, of course, that the severance of the land by the railroad"—now this is the passage which is very important, and is entirely in accordance with what I said—"the object was, of course, that the severance of the land by the railroad should leave the owner of the land as fully master of the land for all purposes as he was before, so that he did not interfere with the working of the line, exactly as in the usual reservation of minerals." Therefore it leaves the owner of the adjoining land just as he was before, as if the line had not been made, so that he did not interfere with the working of the line. Would any man venture to say that these seven windows looking over the railway in any way

(1) Law Rep. 10 Ch. 589.

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interfered with the working of the line, or could be of the slightest disadvantage to the proprietors of the line? "The object" (he says) "is simply to give to the railway company an uninterrupted right of way for themselves across the land, but not to take away from the owner anything that is not absolutely necessary for the purpose of the railway." Now, is it at all necessary for the purposes of this railway that these windows should be prevented from looking over it? Does it interfere with their working, or interfere with any right whatever which they had? It is impossible for any one to say that it does.

Bostock v. *North Staffordshire Railway Company* (1) is a much earlier case, but it completely bears out the decision laid down by the Court of Appeal and myself in the case I have referred to. There the railway company had acquired a reservoir in a beautiful part of *Staffordshire*, and it was very attractive, and the company thought they could turn it to account, and they did so by advertising, on any great holiday, regattas on this great sheet of water. Mrs. *Bostock*, who was a widow lady living in the neighbourhood, had a very beautiful place and grounds close by, and she complained that the result of this was to collect disorderly crowds of people, who broke down her fences and trod down her grass, to her great injury, and she said it was not the right of the railway company, and it was not within the business of a railway company, to collect crowds of people and to permit this kind of disorder. The railway company said, We are owners of this land, the fee simple is conferred upon us, the owner of the fee simple can do as he likes; but Sir *James Parker*, before whom the case came in the first instance, considered it was a nuisance, and, according to the then practice of the Court, gave liberty to Mrs. *Bostock* to bring such an action as she might be advised. She brought an action, which resulted in the opinion of the Court of Queen's Bench being taken, and three Judges against one (that being Mr. Justice *Erle*) came to the conclusion that, although they were the owners of the railway and reservoir in fee simple, they had only a qualified ownership, and were only entitled to use it for the purposes for which they acquired it, that to use it for this purpose was not within the object of the Act, and they were restrained perpetually

(1) 5 De G. & Sm. 584.

from using it for any other purpose than as a railway and canal. Sir *John Stuart*, who ultimately disposed of the case, says (1), "Indeed, it is the settled doctrine of this Court that the rights of ownership in fee conferred on public companies must be restricted and qualified by the terms of the legislative contract. In *Blakemore* v. *Glamorganshire Canal Company* Lord *Eldon* said (2): 'When I look upon these Acts of Parliament I regard them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that unless that principle is applied in construing statutes of this description they become instruments of greater oppression than anything in the whole system of administration under our constitution.'" Then Sir *John Stuart* adds (3): "It has been said that the purpose of letting pleasure-boats for hire is an innocent purpose, and ought not to be objected to. But it is enough that the purpose is not contemplated or authorized by the Act of Parliament; for, if it be objectionable to the landowner, if he conceives it to be injurious to him as interfering with his comfort, or even as distasteful, he has a right to confine the enjoyment within the essential terms of the contract."

Now this railway company, I think, knowing perfectly well they had only a right to the fee simple of the land for the purpose for which they acquired it, namely, the construction and perpetual working of the railway, set up this sort of defence: It is within a mile of *Birmingham;* the station accommodation is defective there; we may have to build a station; and because we may have to build a station, therefore we have a right to prevent anybody looking over the railway; if we allow them to acquire an adverse right, it may lead to our being prevented from building this station. Now Mr. *Glasse's* argument on the subject is that the company have a right to stop the windows of any person who overlooks the railway at a place where the company may want a station, or, to use his own words, No man, by erecting his house on this spot, ought to be allowed to acquire a prescriptive right to prevent the company doing that which they are entitled to do at

(1) 3 Sm. & Giff. 291. (2) 1 My. & K. 162.
(3) 3 Sm. & Giff. 292.

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the spot, namely, erect a station. If that is so, then, according to that, any railway company at any spot on their road, and this railway company at any place between *London* and *Birmingham*, if a man erects a house looking over the railway, may immediately come and block up his windows, and say, "We do not know but that hereafter we may have to build a station here." They have no such right, nor (unless authority is cited to the contrary) do I believe that a railway company whose stations are usually found in the deposited plan have a right to go and erect stations wherever they think fit.

I will further illustrate what I have said in reference to this case with regard to the limited power of railway companies. I have pointed out that, though they have an absolute and unqualified fee simple, they can only use the land for the purpose for which they acquired the land, but not, as against the adjoining proprietor, from whom they have taken it, in a manner which will prevent his using the land for any purpose for which he could have used it if this land had not been taken from him. Then, as they have not the unqualified right of using the land, so they could only use it for the purposes for which the capital is raised. They cannot embark in an extraneous trade, as was decided in *Attorney-General* v. *Great Northern Railway Company* (1), following the decision of *Colman* v. *South Eastern Railway Company* (2), which decided that the *South Eastern Railway Company*, having raised capital for the purpose of making a line to *Dover* or *Folkestone*, could not embark in or carry on the business of steamboats between those ports and the coast of *France*. Their property and their purposes are altogether of a limited character. Therefore, on those grounds, being most distinctly and clearly of opinion that the company had no right whatever to interfere with the Plaintiff's enjoyment of these windows, I hold that their proceeding is wholly illegal and improper, and I decide that the Plaintiff is entitled to a perpetual injunction to prevent the future blocking-up of his windows, and he is also, in my opinion, entitled to damages for the injury he sustained during the period they were blocked up. I am also of opinion that the Plaintiff is entitled to compensation

(1) 1 Dr. & Sm. 154. (2) 10 Beav. 1.

for the damages which he sustained by the smoke nuisance. In the case of *Fenwick* v. *East London Railway Company* (1), the Master of the Rolls decided that where a thing may be done in one of two ways—one of which is injurious, and one of which is not—the railway company are bound to do the thing in a manner which will not be injurious. These Defendants are bound by the Act of Parliament—(not the *Lands Clauses Act*, which does not provide for this case, but by their own Act of Parliament, which I have looked to)—to do as little injury as may be in the construction of their works. And as they had two modes of using their cabin, one by burning a gas fire, and the other by burning a coal fire, and chose to do it in a manner injurious to the Plaintiff, he is entitled to be compensated for that wrongful act.

These points are comparatively simple. But the railway company say that the Plaintiff is not entitled to the land which he has taken from Sir *Charles Adderley* up to the boundary fence; but that the railway company are entitled to 4 ft. 6 in. on the other side of their boundary fence. Now this raises a very important question. It appears by the evidence on both sides that the uniform practice of railway companies when they acquire land by their compulsory powers, is first to erect at their extreme boundary rails and posts, so that all within the rails and posts belong to the railway company, and all without belongs to the owners of the adjoining land. But inasmuch as posts and rails are not a perpetual barrier, because they decay and require repairing, and are liable to be broken down, the general practice is, that within a certain distance, which I think may be taken to be four feet within the boundary, they make a quickset hedge. During that time the boundary posts and rails are still retained; but when that hedge has sufficiently grown up, the posts and rails are either taken away, or allowed to go to decay, or they are disregarded. But in certain cases they not only plant the quickset hedge, which is allowed to grow up, but they make a ditch on the outer side of the quickset, between that and the posts and rails. Then they say the ditch belongs to the railway company. Now I do not think it necessary for me in the present case to give any opinion whether a railway company may or may not be necessarily

(1) Law Rep. 20 Eq. 544.

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owners of such ditch as above described, because, although where it can be conclusively and advantageously done it is the practice outside the quickset hedge to have a ditch, it evidently is not a uniform practice, but depends upon circumstances, and I come to the conclusion from the evidence that on this particular spot it was found not necessary to have a ditch.

This strip of land, therefore, is abandoned, in my opinion, and it is not necessary for me to go into the question whether upon the cases a railway company not using land for ten years abandons it so as to vest it in the owner of the adjoining land; because I am thoroughly of opinion in this case that there was never a ditch, and, if there had been one, their own conduct amounts to a deliberate abandonment of it, in allowing it to be taken possession of by the owner of the adjoining land, who has ploughed it up to the very hedge.

It was the deliberate intention of the railway company, acted on for more than twenty years before this dispute arose, that the hedge should be the natural and visible boundary of their railway. All within that hedge was theirs, and all without it was Sir *Charles Adderley's*, and he has demised it to the Plaintiff.

Therefore on this point also I come to the conclusion that the counter-claim set up by the Defendants to have this 4 ft. 6 in. of land has entirely failed, and the counter-claim, therefore, must be dismissed with costs.

Solicitors for Plaintiffs: *Clarke, Woodcock, & Ryland*, agents for *B. Chesshire, Birmingham.*

Solicitor for Defendants: *R. F. Roberts.*

In re BRITISH ALLIANCE ASSURANCE CORPORATION.

V.-C. M.
1878
May 10, 17; July 19.

Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *s.* 21—*Primâ facie Case—Security for Costs—Winding-up—Demurrer to Petition—Creditors for less than* £50 *—Policy-holders—Allegation of Insolvency—Secretary appointed Liquidator—Practice as to opening Demurrer.*

A petition was presented by two policy-holders to wind up compulsorily an insurance company which was being wound up voluntarily, containing charges of false representations and insolvency:—

Held, upon a preliminary objection, that where a company was being wound up voluntarily it was unnecessary to consider whether a *primâ facie* case was stated, nor to order security for costs under the *Assurance Companies Act*, 1870:

Held, upon demurrer to the petition, that policy-holders might present a petition under the Act of 1870, although their debts did not amount to £50; that a statement—that under the circumstances the company was "admittedly insolvent"—was a sufficient statement that they could not pay their debts; and that the allegations of false representations, and the appointment of the secretary as provisional liquidator, were sufficient to render it just and equitable to make a winding-up order:

Held, also, that upon demurrer to a petition, the counsel for the Petitioner must open his case.

Statement.

THIS was a petition for a compulsory order to wind up the *British Alliance Assurance Corporation*. The petition stated that the company was incorporated on the 4th of April, 1868, for the issuing of life assurance policies and granting of annuities.

The nominal capital was to consist of £100,000, divided into 100,000 shares; but up to July, 1876, only 5788 shares had been subscribed for, and not much capital had since been subscribed for or taken. The company had published a pamphlet, in which one of the advantages held out was "special inalienable trust funds as a security for policy-holders only, thus making their payments an absolute certainty. The net value of all policies and annuities in force, according to the latest table of mortality, together with one-fifth of the paid-up capital, will be deposited in permanent trust as a special guarantee fund for the sole protection of the assured. These funds can only be invested in first-class Government or guaranteed securities." That the said security of the

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Statement.

alleged "special inalienable trust funds" was only pretended, and there were in fact no such funds of any importance belonging to the company.

In January, 1878, the two Petitioners, *G. E. Holland* and *E. Englehard*, were induced, upon the introduction of a person calling himself *William Holland* (there being no such person), to insure their lives in the *British Alliance Corporation* for £200 each, and to pay in one case £7 for premium and £4 4*s.* for expenses, and in the other case £5 10*s.* for premium and £3 3*s.* for legal expenses. That they had so insured their lives with the expectation held out to them by "*William Holland*" that he would make advances of money to them, but after having effected the said policies, "*William Holland*" excused himself from advancing money to them. The Petitioners believed that the company, and the person trading under the assumed name of "*William Holland*," acted in these transactions in concert, and afterwards divided between them the sums so obtained, and the company was now liable under the circumstances aforesaid to repay to the Petitioners the said sums, and the Petitioners were now creditors of the company for the same. The Petitioners had reason to believe that in other cases a similar course had been pursued towards other persons requiring loans from "*William Holland.*" That on the 15th of February the company passed a resolution to wind up voluntarily, and appointed their secretary, *H. Grobecker*, to be their liquidator.

The petition then alleged that the company was, under the circumstances aforesaid, admittedly insolvent, and that there were, under the circumstances, transactions of the company requiring investigation by the Court, and that it was just and equitable, and for the advantage of all persons interested therein, that the company should be wound up by the Court instead of being wound up voluntarily, and that in the meantime Mr. *Grobecker* should be restrained from interfering in the business or assets of the company.

May 10. A preliminary objection was taken to the petition that, under the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), s. 21, the Court could not give a hearing to the petition until security for costs should be given and until a *primâ facie*

case should be established; and it was contended that no *primâ facie* case of insolvency was made upon this petition, and the fiat ought to be struck out.

Glasse, Q.C., and *C. H. Turner*, for the company, referred to *In re British Imperial Assurance Company* (before the Court of Appeal, Nov. 3, 1875) and *In re European Life Assurance Society* (1).

J. Pearson, Q.C., and *Oswald*, in support of the petition, contended that the provisions of the Act did not apply where the company had itself passed a resolution to wind up voluntarily.

Higgins, Q.C., and *H. B. Buckley*, for shareholders, and

Sturges, for policy-holders.

MALINS, V.C., held that, as the company had passed a resolution to wind up voluntarily, he was not bound to consider whether the petition stated a *primâ facie* case, nor to order security for costs to be given, and he declined to order the fiat to be struck out.

The petition then stood over.

May 17. On the petition being called, counsel for the company stated that they demurred to it, and a question was raised as to which side should open the demurrer to the petition, and after some discussion,

MALINS, V.C., said:—

I do not wish the matter to remain in any doubt, therefore I beg to express my decided opinion that on all petitions to wind up or otherwise, the proper course is that the Petitioner should open the case, and if upon the face of the petition it is plain that no reason is made out for it, the Court will itself take notice of that fact, or at all events will hear the counsel for the Respondents; but I think where it is stated to be a demurrable petition without any formal demurrer, to say that the Respondent can open the petition would be a most inconvenient practice. Suppose Mr. *Glasse* were to open his case, and should not succeed in making

(1) Law Rep. 9 Eq. 122.

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this a demurrable petition, could I make him pay the costs? I should not be able to do so. Therefore my opinion is that in all cases the Petitioner must open his case.

J. Pearson, Q.C., and *Oswald*, in support of the petition for a compulsory winding-up of the company, opened the case for the Petitioners.

Glasse, Q.C., and *C. H. Turner*, for the company:—

The grounds of demurrer to this petition are, first, that the Petitioners are not creditors to the amount of £50, and are therefore precluded, under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 80, sub-s. 1, from presenting a petition to wind up the company. This was decided in *In re Wear Engine Works Company* (1) and *In re Langham Skating Rink Company* (2).

The Petitioners are not policy-holders or shareholders, and cannot therefore present a petition under the *Life Assurance Companies Act*, 1870. They allege only that they were induced to effect policies for the purpose of obtaining a loan of money, but the policies were only for one year, and they are no longer policy-holders, and if they ever were so, the petition is not presented on the ground of their being policy-holders or shareholders, but on the ground of their being creditors, and if so, their debts do not amount to the requisite sum.

The next ground of demurrer is, that there is no allegation that the company is unable to pay its debts. The only statement is, that the company is "admittedly insolvent." There is no statement that the Petitioners ever demanded payment of their alleged debt and were refused, consequently it cannot be that the company have admitted their insolvency. A voluntary winding-up by a resolution passed by the company themselves is not an admission of insolvency. A company may be voluntarily wound up when it is perfectly solvent and capable of paying its debts, although circumstances may render it advisable to wind up its affairs. We allege as another ground of demurrer that there are no facts stated which should render it just and equitable that the company should be wound up compulsorily.

(1) Law Rep. 10 Ch. 188. (2) 5 Ch. D. 669.

Higgins, Q.C., and *H. B. Buckley*, for shareholders of the company opposing the winding-up compulsorily.

Sturges, and *Hull*, for policy-holders supporting the petition.

J. Pearson, in reply :—

Argument.

This petition contains every statement which is requisite for obtaining a winding-up order. There is a distinct allegation that the Petitioners are policy-holders, which is sufficient, under the Act of 1870, to entitle them to present a petition. Then the statement that under the circumstances the company is admittedly insolvent, can only mean admitted by the company themselves to be insolvent, and the fact that they have passed a resolution to wind themselves up voluntarily is tantamount to an admission that they cannot pay their debts. They have also appointed their own secretary to be the voluntary liquidator, which is sufficient of itself to shew the necessity of interference by the Court. And further, there are circumstances of fraud alleged on the petition which are sufficient to shew that it is just and equitable that the company should be wound up.

MALINS, V.C. :—

Judgment.

The only question I have to decide is whether the allegations are enough in this petition, assuming them to be proved, to entitle the Petitioners to an order to wind up the company compulsorily. First of all there is an allegation that these Petitioners are not sufficiently described as policy-holders. I fancy that that is not open to argument. They are, in my opinion, properly described as policy-holders. They cannot be policy-holders unless they have paid the premiums, and that they allege they have done. But it does not rest there, because the petition states that the life of each of the parties is insured for £200 in the office of the company, and how a man's life can be insured in an insurance office without his being a policy-holder I do not know. Therefore I think they are rightly described as policy-holders. Then comes the allegation that the company is insolvent. The petition states, and the liquidator himself says that he has been appointed by the company for the purpose of winding up the company voluntarily. It is

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then stated that "the company is under the circumstances admittedly insolvent." Now if the words had been "the company is insolvent," that would have been a perfect allegation. The words of the 79th section are: "Whenever the company is unable to pay its debts," and if a company is stated to be insolvent, that is, in my opinion, equivalent to an allegation that the company is unable to pay its debts. Therefore, although the words are not strictly in accordance with the 79th section, the statement that the company is admittedly insolvent is a statement of their insolvency. It has also been urged that in this case there is no debt owing to the Petitioners upon which they can sue, because the debts do not amount to £50. But upon reference to the 21st section of the *Life Assurance Companies Act*, 1870, I think if the Court has conclusive evidence that the company is unable to pay its debts it may grant a winding-up order, and it is unnecessary to prove that the amount is more than £50. What are the objects of that Act? Many petitions were presented to the Court to wind up insurance companies which were found to be unjustifiable. It was felt that petitions might be presented to the Court for winding up against any well-established insurance office on the assumption that it was insolvent; therefore, in order that there should be proper protection given to those that were solvent, and to prevent what I have heard in this Court called "wreckers' petitions," the 21st section says: "The Court may order the winding-up of any company in accordance with the *Companies Act*, 1862, on the application of one or more policy-holders"—it does not say policy-holders of any particular amount—"upon its being proved to the satisfaction of the Court that the company is insolvent; and in determining whether or not the company is insolvent, the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts; but the Court shall not give a hearing to the petition until security for costs for such amount as the Judge shall think reasonable shall be given, and until a *primâ facie* case shall also be established to the satisfaction of the Judge." Now the question was raised on Friday last whether a preliminary inquiry was necessary; my reason for not requiring it was that the company had itself resolved to wind up voluntarily, which was an admission of their insolvency.

I quite admit that in this case the resolution to wind up voluntarily is not stated to be on the ground of their inability to pay their debts. But there is no doubt in point of fact that their resolution to wind up voluntarily was because they could not meet their engagements. Therefore I think the circumstance is admitted by the company to exist, and the only object of a preliminary inquiry would be to prove the very fact which by their own proceedings they have admitted.

Upon the technical point, therefore, I come to the conclusion, on the allegation of the Petitioners, that I must take them to be policy-holders, and that they come within the 21st section of the *Life Assurance Companies Act*, 1870, which entitles them to present a petition to wind up, whatever the amount may be. Also, as to the allegation in the petition regarding the insolvency of the company, I must take it to be an allegation that they are insolvent.

Then, as they have passed a resolution to wind up voluntarily, the question is, why should a compulsory order be made? I find allegations in this petition which undoubtedly amount to allegations of gross fraud. It is of the highest importance to all insurance businesses that persons who are invited to effect policies in their offices should not be misled by any false statements, and I find it alleged here that false statements have been held out as to providing a special guarantee fund for the protection of the assured, and I find it is also alleged in this petition that the company have resolved to wind up voluntarily, and appointed their own secretary as liquidator, who, of course, instead of exposing their transactions, will throw his cloak round them. These allegations are sufficient to induce me to say that I cannot accede to the argument that I ought summarily to put the petition out of Court. If it were necessary, I certainly, in accordance with what was stated by Lords Justices *James* and *Cotton* in *In re Wear Engine Works Company* (1), should give leave to amend. It is said that "a winding-up petition must allege facts which justify a winding-up order." I cannot imagine any petition which more completely justifies a winding-up order than this does. Lord Justice *James* says the Court can allow a petition to be amended. I am very

(1) Law Rep. 10 Ch. 188.

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glad to find that it is so. We know in pleas and actions liberty is given to amend, and I certainly in this case should give liberty to amend by leaving out those words "admittedly insolvent," and allow such allegations to be introduced as would shew the insolvency. It appears on every ground that this petition comes under that section of the *Companies Act* which says that whenever the Court shall be of opinion that there is a just and equitable ground for a winding-up order, it shall be granted. Therefore I do not think, under the circumstances, it is necessary for me to give leave to amend.

July 19. The petition now came on for hearing, the same counsel appearing for the different parties.

MALINS, V.C.:—

It will be useless for me to hear further arguments in this case. The company is being wound up voluntarily, and they have appointed their own secretary as the provisional liquidator. It is evident that there are circumstances connected with the management of the company which require strict investigation, and I have already expressed my opinion that these investigations cannot be effectually carried on by a friendly liquidator—one who has been secretary of the company. I have always considered that in such cases a compulsory order to wind up is the best for all parties; and I think these gentlemen, whose conduct is impugned, ought to be very glad to have the affairs of the company investigated by an impartial liquidator, and to have an opportunity of exonerating themselves. Under these circumstances, I shall make the usual compulsory order to wind up, and there will be the usual order as to costs.

Solicitor for Petitioners: *J. Robinson.*
Solicitor for Company: *E. Beall.*
Solicitor for other parties: *N. Jourdain.*

BERKELEY *v.* STANDARD DISCOUNT COMPANY.

V.-C. M.
1878
Aug. 3.

[1877 B. 504.]

Practice—Interrogatories—Rules of Court, 1875, *Order* XXXI., *rr.* 4, 5, 8.

Upon an application for leave to serve interrogatories on a member of a company which is a party to an action, leave will be given where the Judge is satisfied that the member sought to be interrogated is likely to be able to give discovery; and the Judge is not bound at this stage of the proceedings to consider the propriety of the proposed interrogatories.

Statement.

THIS was a motion on behalf of the Plaintiff. By his statement of claim the Plaintiff claimed to be released from 2000 shares in the Defendant company, and to have three bills of exchange for £3000 given by him to the Defendant company, cancelled. It appeared that the Defendant company was incorporated in May, 1873, for the purpose of taking over the discount business of the firm of *Blockey, Sterling, & Co.*, and the 13th section of the agreement to sell to the Defendant company appended to the articles of association provided that *J. C. Sterling*, one of the vendors, should be a director of the Defendant company for five years. It appeared also that *J. C. Sterling* was on the register of members of the Defendant company. The statement of defence was delivered by the Defendant company on the 27th of March, 1878, and on the 15th of April, 1878, the Plaintiff applied by summons at Chambers for an order allowing him to deliver interrogatories to *J. C. Sterling*. This application was opposed by Messrs. *Argles & Rawlins*, the solicitors of the Defendant company, and affidavits were filed on both sides; however, on the 6th of May, the Vice-Chancellor made an order in Chambers that the Plaintiff be at liberty to deliver interrogatories for the examination of *J. C. Sterling*, a member of the Defendant company. On the 14th of June a summons was taken out by Messrs. *Linklater & Co.* to rescind the order of the 6th of May, and on the 22nd of July an order was made in Chambers granting this summons. The Plaintiff now moved to discharge the order of the 22nd of July.

Argument.

Higgins, Q.C., and *Mulligan*, for the Plaintiff, contended that

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J. C. Sterling had no *locus standi* under Rules of Court, 1875, Order XXXI., rule 5, and that, being a vendor, director, and member, liberty was properly granted under Order XXXI., rule 4, to deliver interrogatories to him.

Argument.

Glasse, Q.C., and *H. B. Buckley*, for *Sterling*, contended that the order allowing the interrogatories was improperly granted, that it was the duty of the Judge to read the interrogatories before granting the order; that this was the practice at Common Law, and they cited *Common Law Procedure Act*, 1854, s. 51; *Bechervaise* v. *Great Western Railway Company* (1); *Wilson* v. *Church* (2).

Judgment.

MALINS, V.C.:—

The only point I have to decide on the present application is whether leave was properly granted to serve Mr. *Sterling* with interrogatories. There is no doubt that the old practice of making an officer of a company a party for the purpose of discovery was in many instances very inconvenient. The *Judicature Act* has substituted a different mode of procedure, and the 4th rule of Order XXXI. provides: "If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at Chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly." The Plaintiff, desiring to avail himself of that rule, applied at Chambers by summons for leave to deliver interrogatories to Mr. *Sterling*, a member of the Defendant company, which was a discount banking company. The Plaintiff made an affidavit shewing that Mr. *Sterling* was a vendor to, and until recently a director of, the Defendant company, and that he is still a member, and well acquainted with all its affairs. I think, according to rule 4 of Order XXXI., there was sufficient material before me in Chambers, and sufficient foundation for granting the Plaintiff's application on his summons. Then Mr. *Sterling's* solicitor took out a summons to rescind the leave so granted, and in order that

(1) Law Rep. 6 C. P. 36. (2) *Ante*, p. 552.

the question, which is one of importance, might be argued in Court, I allowed that summons. It is now argued on behalf of Mr. *Sterling* that the Plaintiff's original application was a very improper one, that before leave is given the Court must read through the proposed interrogatories and see that they are proper. That is not, in my opinion, the proper interpretation of these rules. It is at another stage of the proceedings that the interrogatories are, if necessary, to be sifted. The first step is to fix on the person to be interrogated. And what is the hardship of allowing the Plaintiff to deliver interrogatories to Mr. *Sterling?* If the interrogatories are not what they should be, another rule of the same order enables Mr. *Sterling* to object to them. Then as to authorities, the case of *Wilson* v. *Church* (1) has been cited, but that case has no application to the present. There the Master of the Rolls decided that it is not the practice now to make a member or officer of a company a party for the purpose of discovery merely, and struck out a person so made a party. If the Plaintiff had made Mr. *Sterling* a party to this action in order to obtain discovery, I should have made the same order as the Master of the Rolls made, and struck him out. I quite concur in that decision. The Master of the Rolls expressed no opinion on the point now before me. I think the order that the Plaintiff be at liberty to serve *Sterling* with such interrogatories as he may be advised was a proper order and must stand, and the order of the 22nd of July must be discharged.

Solicitors for Plaintiff: *W. & J. Gibson.*
Solicitors for *Sterling:* Messrs. *Linklater & Co.*

(1) *Ante*, p. 552.

V.-C. B.
1878
May 20, 25.

OLIVANT *v.* WRIGHT.

[1873 O. 18.]

Estate in Fee Simple—Limitation over on Death "without leaving Issue."

By settlement made in 1817 freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of *A.*, deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of *A.*, their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children of *A.* should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying unto and equally between persons named.

A. had two children, one of whom, *B.*, died intestate and unmarried, the other, *C.*, intestate as to his share, but leaving a daughter, *D.*:—

Held, that the interest taken by *D.* under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue.

Statement.

BY a marriage settlement dated the 24th of June, 1817, certain freehold and leasehold and other personal property was conveyed and assigned to trustees as to four-fifths upon the trusts therein mentioned, and as to one-fifth part of the rents, issues, interests, and profits of the said trust, hereditaments, moneys, and premises, upon trust to pay and apply the same in the maintenance, education, and support of the two children of the late *James Morris*, deceased, until the youngest of them should attain the age of twenty-one years, in such shares as the trustees or the survivor of them should think proper; and from and after the youngest of the children of the said *James Morris* should have attained the said age of twenty-one years should pay the last-mentioned fifth part of the said rents, issues, interest, and profits unto and equally between the two children of the said *James Morris*, their heirs, executors, administrators, and assigns respectively: provided nevertheless and upon further trust in case either of the children of the said *James Morris* should depart this life without leaving lawful issue, that the trustees should pay the share or shares of him, her, or them so dying of and in the said

rents and profits unto and equally amongst all and every the children of certain persons therein named.

James Morris had two children only, *John* and *Mary*.

Mary Morris died in June, 1861, intestate and unmarried.

John Morris died in January, 1820, having had one child only, namely, *Ann*, and intestate as regarded his interest under the deed of June, 1817.

In August, 1841, *Ann Morris* married *George Potts*, and by him she had two children, *John Michael Potts* and *Mary Ann Potts*. *Mary Ann Potts* died in infancy unmarried, and *John Michael Potts* was still living. The said *George Potts* died on the 22nd of February, 1845, leaving his said wife him surviving.

After the death of her first husband, *Ann Potts*, in December, 1847, married *Samuel Shenton*, and a post-nuptial settlement, dated the 22nd of January, 1859, was executed, by which, with her husband *Samuel Shenton*, she settled upon the trusts therein mentioned all her moiety or share of the one-fifth part of the freehold, leasehold, and personal estate comprised in the settlement of June, 1817, to which, as heiress of *John Morris*, she was entitled.

Ann Shenton died on the 25th of January, 1867, without having exercised a power of appointment reserved to her under the post-nuptial settlement of January, 1859.

On the 14th of March, 1877, *John Michael Potts*, in the belief that the interest comprised in the settlement of 1859 was an estate tail, and that from that settlement not having been inrolled as a disentailing assurance the interest had devolved upon him unaffected by the settlement, executed a disentailing assurance (duly inrolled), by which he conveyed the property to *Samuel Shenton* in fee. Subsequently to this deed *Samuel Shenton*, dealing with the property as owner in fee, mortgaged it to one *Willcock*.

The question which now arose upon adjourned summons was, whether the interest which *John Morris* took in one moiety of the property was an estate tail, which, having devolved upon *John Michael Potts*, was barred by the disentailing assurance executed by him in March, 1877, by which he purported to convey the property to *Samuel Shenton* in fee; or whether the interest taken

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by *John Morris* was an estate in fee simple which had descended upon *Ann Potts*, and was therefore bound by the post-nuptial settlement of 1859.

Sir *H. Jackson*, Q.C., and *A. T. Watson*, for *Samuel Shenton*, and persons claiming under him:—

The limitation in the settlement of June, 1817, by which an estate in fee is given to *John Morris*, as one of the two children of *James Morris*, is cut down by the words of limitation over, and he took an estate tail only. Before the *Wills Act* (1 Vict. c. 26) it was clearly established that a devise of lands to *A.*, and if *A.* die without leaving issue, then to *B.*, imported an indefinite failure of issue, and therefore created an estate tail: *Forth* v. *Chapman* (1); *Doe* v. *Duesbury* (2); *Doe* v. *Ewart* (3); and this settled rule of construction is not altered by the circumstance of the gift comprising leaseholds as well as freeholds: *Bamford* v. *Lord* (4). The rule of construction is the same in deeds and wills: *Bamfield* v. *Popham* (5); *Fisher* v. *Wigg* (6). Although, according to *Idle* v. *Cook* (7), the estate originally limited, in a surrender of copyholds, to the use of *A.* and *B.* his wife, for their lives, and of the heirs and assigns of *A.* and *B.*, and for default of such issue to the right heirs of the surrenderor, was held to be a fee simple—though "in a will such words would make an estate tail; purely upon the intent of the devisor;" that case has not been followed: *Morgan* v. *Morgan* (8).

Hemming, Q.C., and *Hamilton Humphreys*, for persons interested under the post-nuptial settlement of 1859:—

The forced rule of construction adopted in *Forth* v. *Chapman*, that the words "die without leaving issue" in a devise of real estate meant an indefinite failure of issue, worked so much injustice and was so much quarrelled with by Judges that the Legislature at length interposed, and by the *Wills Act* (1 Vict. c. 26), s. 29, enacted that "die without issue" means a failure of issue at

(1) 1 P. Wms. 663.
(2) 8 M. & W. 514.
(3) 7 A. & E. 636.
(4) 14 C. B. 708.
(5) 1 P. Wms. 54.
(6) Ibid. 14.
(7) Ibid. 70.
(8) Law Rep. 10 Eq. 99.

the death of the person whose issue are spoken of, unless an intention appear to the contrary. In some of the older cases about the same period as *Forth* v. *Chapman* (1), expressions, no doubt, fell from some of the Judges (as in *Fisher* v. *Wigg* (2) and *Bamfield* v. *Popham* (3)) that the rule in *Forth* v. *Chapman* applied to deeds as well as to wills. But the Judges in subsequent cases were unwilling to extend it, and small circumstances have been relied on to take the case out of the rule: *Porter* v. *Bradley* (4); *Roe* v. *Jeffery* (5). The cases cited do not support the contention that the same rule applies in construing a settlement as in construing a will. In a will the intent of the devisor is to be regarded, whereas a settlement must be construed upon the strict legal meaning of the words used: *Idle* v. *Cook* (6); and the expressions to the contrary in *Fisher* v. *Wigg* (7), *Bamfield* v. *Popham* (8), are mere *obiter dicta* and opposed to the opinion of Chief Justice *Holt*. *Morgan* v. *Morgan* (9) was decided upon different words, the limitation over there being on death "without issue," whereas here the limitation over is on death "without leaving issue." We submit that the estate in fee which was given to *John Morris* as one of the children of *James Morris*, cannot be cut down to an estate tail by ambiguous words: *Cruise's* Dig. (10).

Sir *H. Jackson*, in reply:—

The same construction will be applied in a deed as in a will; and though Judges in former times stood out stiffly against the doctrine, there is no doubt that where conveyancing words have been used in a deed together with popular words, you may look at the whole intention of the deed, so that it be not inconsistent with the rules of law. Both before and since the *Wills Act* "dying without leaving issue" is a convertible term with "dying without issue," so that *Morgan* v. *Morgan* governs this case, and although "dying without issue" now implies a failure of issue at the death of the person whose issue are spoken of, these words were in 1817 strictly construed as implying an indefinite failure of issue.

(1) 1 P. Wms. 663.
(2) Ibid. 14.
(3) Ibid. 54.
(4) 3 T. R. 143, 146.
(5) 7 T. R. 589.
(6) 1 P. Wms. 70, 75.
(7) Ibid. 14, 15.
(8) Ibid. 54, 57, and note.
(9) Law Rep. 10 Eq. 99.
(10) Vol. iv. p. 281, pl. 19.

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BACON, V.C.:—

No doubt the distinction between a deed and a will is a very palpable one. A deed is a contract by which the owner of property gives a certain destination to it then and thenceforth for ever, and he parts with all his power over it. A will is an instrument which is not to take effect till the death of the testator. The Court has gone great lengths in endeavouring to ascertain what was the intention of the testator in construing his will. In construing a deed, you must also ascertain what was the intention of the party. The intention here is perfectly obvious and distinct, and I do not believe that any man alive, lawyer or layman, could read this instrument and doubt what the meaning of the words there contained ought to be held to be. A man having to dispose of his property divides it into fifths; as to one fifth, he leaves it to the children of a man named, and they being children at the time, he provides for the application of the income to their maintenance and education, and upon their attaining twenty-one he gives it them absolutely. The deed is then complete, and has accomplished that entire object. Then it is suggested, or it occurs to somebody, that these children, now infants, whose maintenance is provided for, may die without leaving issue; and in that event he gives it over to somebody else. Then the contention before me is that I must read the intention of the settlor to be to cut down by means of words contained in the proviso that absolute interest which he has given in the preceding trust declared of the one-fifth. There is no principle of construction which would justify me in doing so. There is no authority, and there has been no case cited to me which would at all incline me to do so. The authority of *Forth* v. *Chapman* (1) need not be adverted to. This is not a will—it is enough to dispose of that part of the case by saying that. But the other cases in which there have been under the consideration of the Court deeds, or something equivalent to deeds, do not seem to me to favour the construction that this testator, who gave an absolute interest to two children, providing for their maintenance during their minority, and giving them the fee simple when they attained twenty-one years—meant in the case mentioned in the proviso to do more than to provide for the circum-

(1) 1 P. Wms. 663.

stance of the absolute gift of the fee simple made by him to the two children becoming abortive and inoperative because they or either of them might die in their infancy. That is the way I read the deed. In my opinion, that is the only construction to be properly put on it. The only difficulty I have among all the cases which have been cited, is that presented by the case of *Morgan* v. *Morgan* (1). But at the same time I cannot disregard the case of *Idle* v. *Cook* (2), where the decision plainly was, that, there being a gift to the husband and wife for their lives and afterwards to their issue, and a gift over in default of such issue, that had not the effect of cutting down the absolute unqualified fee simple which was given by the previous trust contained in the surrender. I do not find that that case engaged the attention of Lord *Romilly* in the case of *Morgan* v. *Morgan*. The only observation I can find in it is "notwithstanding *Idle* v. *Cook*." That, in my opinion, can be answered and disposed of by recollecting that the words are different, that the words in this case are "without leaving issue," and in *Morgan* v. *Morgan* they were "without issue."

Adopting all that has been said about these cases—keeping in my mind the distinction between a will and a deed, which is that which I have already expressed, the intention being, notwithstanding, the governing principle in both cases—I read in this deed an intention, expressed and executed, that an interest in fee simple shall be given to each of these children as soon as they shall respectively attain the age of twenty-one years, and if before that time—I do not mean that there are any such words in the deed, but as I construe the deed it means this—if before that time the provision he had made for these children should cease to be effectual, he gives it over to somebody else. That is the plain meaning of the deed. That, in my opinion, is the legal construction of the deed, and I think the only child of *John Morris* ultimately took on her father's death intestate an estate in fee simple, and that that is bound by the settlement of 1859, afterwards executed, and that no estate tail was created.

Solicitors: *Miller & Wiggins; Johnson & Weatherall.*

(1) Law Rep. 10 Eq. 99. (2) 1 P. Wms. 70, 75.

V.-C. H.
1878
Jan. 12, 18.

In re FARNCOMBE'S TRUSTS.

Appointment—Excessive Exercise—Contingent Class—Objects—Non-Objects—Ascertainment at Future Period.

The donee of a power to appoint a fund in favour of her own issue, "such issue to be born before any such appointment," by deed, after reciting the power and her desire to exercise it, and the state of her family, appointed the fund to her daughter for life, and after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one.

At the date of the appointment the daughter had three children living (including one *en ventre sa mère*), and she had three born afterwards. One of the children had attained twenty-one, and the rest were minors:—

Held, first, that issue in existence at the date of the deed of appointment were the only objects of the power. Secondly, that upon the construction of the deed the intention of the appointor was to include non-objects, *i.e.*, issue born after that date. Thirdly, that the appointment was not thereby bad *in toto*; but that, fourthly, the share of each object would be determined by the total number of objects and non-objects who should fall within the class in whose favour the appointment purported to be made.

Under the circumstances, one-sixth of the fund in Court directed to be at once paid out to the child who had attained twenty-one, and the remainder to remain in Court, and the dividends thereon to be accumulated.

Statement.

PETITION.

Philadelphia Farncombe the elder, by her will, dated in January, 1825, devised certain lands in trust for sale, and directed the trustees to invest the net proceeds thereof and to stand possessed of the trust funds to be produced thereby upon trust to pay the income to her granddaughter, *Philadelphia Tanner*, during her life, and after her death to hold the trust fund "in trust for the child, grandchild, or other issue, or all or any one or more of the children, grandchildren, or other issue of the said *P. Tanner*, or of any of the testatrix's daughters, *Mary Hodson*, *Sarah Hardwick*, and *Harriet Gale*, such grandchildren and issue respectively to be born before any such appointment as thereinafter mentioned should be made to them respectively, in such manner and form, and if more than one in such parts, shares, and proportions, and at such times, with such limitations over or substituted in favour of all or any one or more of

the other of the said children, grandchildren, and issue respectively, and either by way of legacy, portion, present or remote interest, or otherwise, and to vest and be payable at such time or times, and upon such contingencies, and subject to such directions and regulations for maintenance, education, and advancement in life, and such conditions and restrictions, as the said *Philadelphia Tanner*," notwithstanding coverture, should by deed or will appoint; and in default of and subject to any such appointment, then on trust for the issue of the said *P. Tanner* who should be living at her death, if more than one as tenants in common, and the executors, administrators, and assigns of the same issue respectively, and so that such issue, if more than one, might take *per stirpes* and not *per capita*, and that no person should take under the description of issue unless the same issue should have died in the lifetime of the said *P. Tanner*, the shares of males to be payable at twenty-one, and of females at twenty-one or marriage. And in case there should be no issue of the said *P. Tanner* at her death, then upon the trusts therein mentioned. And the testatrix thereby gave the residue of her personal estate to the trustees upon trust to convert, invest, and pay the income to her said three daughters and granddaughter equally between them during their respective lives, with trusts upon the death of each of her said daughters and granddaughters respectively in favour of her children, grandchildren, or other issue as such daughter or granddaughter should appoint, in terms similar to the aforesaid powers limited to the said *P. Tanner* with respect to the proceeds of the real estate.

Philadelphia Farncombe the elder died on the 3rd of January, 1832.

Philadelphia Tanner, the donee of the power, had three children, *Philadelphia*, born in 1830, who intermarried with *William Farncombe*, and two other daughters, born respectively in February, 1832, and February, 1839. By deed dated the 29th of December, 1859, Mrs. *Tanner*, after reciting the said will, that she had three children as aforesaid, and that she was desirous of executing the powers of appointment given to her by the said will, in exercise of the said powers appointed that the whole trust premises over which she had power of appointment should after her decease be

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Statement.

held as to one-third part thereof upon trust for her daughter, *Philadelphia Farncombe*, for life, and after her decease upon trust "to divide the same between the children of the said *Philadelphia Farncombe* in equal shares as tenants in common on their respectively attaining the age of twenty-one years, and their respective executors, administrators, and assigns. But if any of such children should die under the age of twenty-one years leaving issue, then the share of such of them so dying should go to such issue to vest in such issue on their respectively attaining the age of twenty-one years; and if there should be but one child of the said *Philadelphia Farncombe* who should attain the age of twenty-one, then for such one child absolutely. But in case the said *Philadelphia Farncombe* should die without leaving any child, children, or issue who should take a vested share in the said trust premises," then the aforesaid third part of the fund was to go in moieties upon the trusts therein declared concerning the other two-thirds; which were trusts in favour of Mrs. *Tanner's* other two daughters and their respective children; one of those daughters being unmarried, and the other having had no children.

Philadelphia Farncombe the younger had six children, of whom two were born before, and one was *en ventre sa mère* at, the date of the appointment, and the other three were born subsequently. She died in April, 1874; one-third of the funds subject to the trusts of the will of *Philadelphia Farncombe* the elder was afterwards paid into Court by the trustees of the will and carried to the account of "the share appointed to *Philadelphia Farncombe* for life;" and a petition was now presented by parties claiming as in default of appointment for distribution of the fund in Court accordingly.

One of the children of *P. Farncombe* the younger had attained the age of twenty-one years in June, 1877, and the others were still under that age.

Argument.

Dickinson, Q.C., and *Hadley*, for the Petitioners:—

Children not born at the date of the deed purporting to exercise the power of appointment are not within the power. The appointment is accordingly void, and altogether fails, and the fund

must be distributed as in default of appointment: *Alexander* v. *Alexander* (1); *In re Kerr's Trusts* (2); *Humphrey* v. *Tayleur* (3).

Morgan, Q.C., and *Langley*, for the three younger children of *P. Farncombe* the younger:—

These children, although begotten and born after the date of the appointment, are within the power because the appointment was made to them at twenty-one, and, there being no appointment to them until they attain twenty-one, it is enough if they are in existence at the time when the appointment to them is made. Until they attain twenty-one the appointment is suspended. If no child attains twenty-one, there is no appointment; if one child attains twenty-one, then that child takes: *Packer* v. *Scott* (4); *Andrews* v. *Partington* (5). But if this is not so, then the whole appointment is void, for where there is a general gift to a class, some members of which are objects of the power and some are strangers, you cannot divide that gift so as to make it good as to some of the appointees and bad as to the others; and if void in part it is void *in toto*. *Routledge* v. *Dorrill* (6); *Harvey* v. *Stracey* (7); *In re Brown's Trust* (8).

HALL, V.C., referred to *Evers* v. *Challis* (9) and *Monypenny* v. *Dering* (10).

W. Pearson, Q.C., and *Everitt*, for the three elder children:—

This appointment is by deed, reciting the power and the state of the appointor's family. Upon the true construction of the deed those children only who were in existence at the date of the appointment (amongst whom must be included the child then *en ventre sa mère*) were intended, and those children take the whole: *Trower* v. *Butts* (11).

Renshaw, for other parties.

(1) 2 Ves. Sen. 640.
(2) 4 Ch. D. 600.
(3) 1 Amb. 136.
(4) 33 Beav. 511.
(5) 3 Bro. C. C. 401.
(6) 2 Ves. 357.
(7) 1 Drew. 73, 117.
(8) Law Rep. 1 Eq. 74.
(9) 7 H. L. C. 531.
(10) 2 D. M. & G. 145, 180.
(11) 1 S. & S. 181.

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HALL, V.C. :—

The first question is, who are the objects of the power? This part of the case is in a very cloudy state, and the construction has been very much left to the Court; but it appears to me that no person was an object who was not born before the making of the appointment, that is, before the execution of the deed. It is plain that the appointees of the interest first given must be so born; but it was, no doubt, worthy of consideration, whether an interest after a life interest might be given to persons unborn. I think not. The power provides for appointments with limitations over in favour of "the said children, grandchildren, and issue." Those words appear to me to refer to issue born before the appointment. If nothing had been given to the parents, then, beyond dispute, nothing could have been given directly to unborn issue; and it is not a reasonable construction, that merely making an appointment to parents would let in as appointees issue who would otherwise not be objects. The words of the power, I think, include as part of the description of the objects, whether to take *in præsenti* or in remainder, that they shall be living at the time of appointment. It follows that the only persons capable of taking under an appointment of this particular share were the three children of *Philadelphia Farncombe*, who were in existence at the date of the deed of appointment.

As regards the appointment, it was contended by Mr. *Pearson* that, having regard to the facts, the deed must be construed as in favour of these three children only. That construction would confine the appointment to persons who were objects. His argument was, that the deed recites the power, that it may be assumed that the grandmother knew what children her daughter had, that she states her desire to execute the recited power: and that, therefore, it is reasonable to limit the appointment, if possible, to objects. The appointment in terms directs a division between the children on attaining twenty-one; but I was asked to read that as "the children now living," because these were the only objects. In the first place, however, that construction would cut down the ordinary meaning of the words. I cannot but take the words according to their ordinary acceptation, notwithstanding that the appointment thus becomes one not authorized by the power. And

further, it is to be observed, that throughout the instrument the lady was not taking a correct view of her power. She provides for the event of children dying under twenty-one leaving issue, which shews that she was not meaning to keep within the true limits of the power. Again, she provides for the fund going over in moieties like the other two-thirds, one of which at least was given to children of whom not one was actually born or *en ventre sa mère*. All the limitations, therefore, being framed upon the same principle, I must give to the words in question their ordinary meaning, and hold that the appointment in terms includes children whether objects or not.

Under these circumstances, the question arises, what is the effect of the appointment? There appears to be no question of remoteness. On the death of the tenant for life, the minimum of the share of each child is ascertained. The appointment is in such a form that the mode of distribution is not to be ascertained till they attain twenty-one; but if there should be only one who attains twenty-one, I do not see why that one, being an object, should not take the whole. So with two or three being objects; but so long as any remain under twenty-one there is a suspense as to the share or shares appointed. There is no illegality in that. But the appointment being to six, you cannot let the objects who attain twenty-one take more than the appointor meant them to take. The residue must go as in default of appointment. As to authority, I think the law is beyond doubt. The matter is elaborately worked out by Vice-Chancellor *Kindersley* in *Harvey* v. *Stracey* (1), a case which was similar to this, except as to the attaining twenty-one; there the fund was given immediately. The Vice-Chancellor, however, works out the principle in his judgment (2), and puts cases which shew how he would deal with the present case. Therefore, upon that case and the case therein referred to, of *Sadler* v. *Pratt* (3), it seems to me that authority as well as principle shew that effect is to be given to this appointment in favour of such of the three then living children as attain twenty-one, the other shares appointed being liable, if the appointees thereof die under twenty-one, to go to increase in part or

(1) 1 Drew. 73, 117. (2) 1 Drew. 131.
(3) 5 Sim. 632.

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wholly, according to circumstances, the shares well appointed. Accordingly, at present none of the three can take more than one-sixth; and that proportion will be paid to the one of Mr. *Pearson's* clients who has attained twenty-one. The other five-sixths will remain standing to the present account, an accumulation being directed of the interest until further order. The costs of all parties will be out of the fund as between solicitor and client.

Solicitors for Petitioners: *Gregory, Rowcliffes, & Rawle.*

Solicitors for other parties: *Clarke & Calkin*, agents for *Clarke & Howlett, Brighton.*

V.-C. H. 1878 *May* 10, 13, 22.

WINGFIELD *v.* WINGFIELD.

[1877 W. 426.]

Will—Construction—Blended Realty and Personalty—Gift of, in Remainder—"Brothers and Sisters then Living, or their Heirs"—Heir-at-Law—Next of Kin—Period of Ascertainment.

28 Ch D 738
25 Ch D 212-3
214

A testatrix by her will gave all her personal and also all her real property to trustees in trust for payment of her debts and legacies, and subject thereto between her five sisters, *nominatim*, and the survivor of them, in equal shares during their lives and spinsterhood, "and upon the death or marriage of all her said sisters," she willed that "her said property should be divided in equal proportions between her brothers and sisters then living or their heirs."

The testatrix had six brothers and six sisters. Of these, one brother died before the testatrix was born, one sister died in the lifetime of the testatrix, but before the date of the will; two brothers and one sister died in her lifetime and after the date of the will, and the rest survived her, the last survivor of them being a sister:—

Held, first, that the word "or" in the gift in remainder could not be read "and," and therefore that there was no intestacy:

Secondly, that as to the personal estate comprised in the gift, the word "heirs" must be construed statutory next of kin (which would include widows), and as to the real estate, heirs-at-law:

Thirdly, that such heirs-at-law and statutory next of kin of the brothers and sisters of the testatrix were to be respectively ascertained, as to the brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as to those who survived her, at their respective deaths:

Fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share: and,

Fifthly, that the heir-at-law and next of kin of the sister who died before

the date of the will, as well as the heir-at-law and next of kin of the two brothers and sister who died in the lifetime of the testatrix and after the date of the will, were so entitled.

De Beauvoir v. *De Beauvoir* (1) distinguished.

ELIZABETH EMILY WINGFIELD, who died in July, 1860, made her will, dated the 5th of April, 1836, as follows:—

"I give and bequeath all my personal property of every description and also all my real property, in trust to my brothers *Thomas Henry Wingfield* and *Charles William Wingfield*, for the purposes hereinafter declared (that is to say), that they the said *Thomas Henry Wingfield* and *Charles William Wingfield* shall pay thereout my just debts, funeral and testamentary expenses, and the following legacies: I give and bequeath unto my said brothers *Thomas Henry Wingfield* and *Charles William Wingfield* the sum of £100 each, and subject thereto I give and bequeath all my personal and real property as aforesaid, and all interest and profit arising therefrom, between my sisters *Mary Anne Wingfield*, *Sarah Wingfield*, *Caroline Wingfield*, *Henrietta Wingfield*, and *Louisa Wingfield*, in equal shares and proportions for and during their natural lives if they shall so long continue single and unmarried, and in case either of them shall die or marry, I will and direct that my said property devolve to the survivors or survivor as long as they remain single and unmarried, and upon the death or marriage of all my said sisters I will and direct that my said property be divided in equal proportions or shares between my brothers and sisters then living, or their heirs."

The estate of the testatrix comprised both realty and personalty, and she had had six brothers, viz., *John* the elder, *John* the younger, *Edward*, *Thomas*, *Charles*, and *George*; and also six sisters, viz., *Mary Anne*, *Sarah*, *Caroline*, *Ellen*, *Henrietta*, and *Louisa*. Of these *John* the elder died in infancy before the birth of the testatrix; *Ellen* died in the lifetime of the testatrix, and before the date of the will; *Edward*, *Thomas*, and *Louisa* died in the lifetime of the testatrix and after the date of the will; and all the others died after the death of the testatrix, the last survivor of them being *Henrietta*, who died a spinster in July, 1877.

(1) 3 H. L. C. 524.

V.-C. H. 1878

WINGFIELD v. WINGFIELD.

Statement.

The Plaintiff in this action, *John Harry Lee Wingfield*, was the eldest son of *John Wingfield* the younger, and was heir-at-law and customary heir of all the testatrix's brothers and sisters, except *George*, whose heir-at-law and customary heir was his son *George Arthur*, one of the Defendants. The other Defendants were the various legal personal representatives and next of kin, or legal personal representatives of next of kin of the brothers and sisters of the testatrix, and the trustees and executors of the will; and the object of the action was to have the rights of all parties interested in the real and personal estate of the testatrix ascertained and declared by the Court.

Argument.

W. Pearson, Q.C., and *Alfred Bailey*, for the Plaintiff:—

It was the manifest intention of the testatrix to provide for her sisters *dum solæ*, and subject thereto to provide for all her brothers and sisters, and their heirs; and the gift is a good gift to the brothers and sisters of the testatrix who were living at the death of the surviving sister, or, by way of substitution, the heirs of such of them as were then dead. The heirs of the brothers and sisters who died before the testatrix are entitled, as well as the heirs of those who survived her, and the heirs of the former must be ascertained as at the death of the testatrix, and of the latter at the time of their respective deaths: *King* v. *Cleaveland* (1); *In re Philps' Will* (2); *Grey* v. *Pearson* (3).

[HALL, V.C.:—The marginal note in *King* v. *Cleveland* leaves out the words "share and share alike," on which the question turned.]

Secondly. The word "or" must be read in its ordinary sense, and not as "and," and all the brothers and sisters being dead, the persons described as "heirs" take on an alternative form of original gift as *personæ designatæ*.

Thirdly, as to the meaning of the word "heirs." Where the gift is of real estate only, the word clearly has its ordinary meaning. Where the gift is of personal estate only, it may mean statutory next of kin; and where there is a blended fund, com-

(1) 4 De G. & J. 477. (2) Law Rep. 7 Eq. 151.
(3) 6 H. L. C. 61.

prising both real and personal estate, then, all being given in one mass, there is no ground for severing the meaning of the word, or preferring one sort of heir to another; and as the heir-at-law must take the realty, and the same person is to take both, he takes both the realty and the personalty: *De Beauvoir* v. *De Beauvoir* (1); *Southgate* v. *Clinch* (2); *Jarman* on Wills (3).

There were here ten brothers and sisters living at the date of the will. If, therefore, the heirs of these only are held entitled, we take nine-tenths; but if the heirs of those who died before the date of the will are included, we take eleven-twelfths of the whole property.

Norman Pearson, for the Defendant *George Arthur Wingfield*, the heir-at-law of the testatrix's brother, *George Wingfield*, who survived the testatrix:—

This is a gift to a class followed by a substitutional gift to the heirs of such members of the class as were dead at the time of distribution, and the heirs of the brothers and sisters who died before the testatrix cannot take anything under the gift: *Ive* v. *King* (4); *In re Sibley's Trusts* (5). All the cases in conflict with this contention contain words which would include members of the original class who were dead at the date of the will. In *Loring* v. *Thomas* (6) the words "shall die" were held equivalent to "shall be dead;" and in *Bebb* v. *Beckwith* (7) the expression "in case of death" was held to mean "in case of death at any time."

Morgan, Q.C., and *W. B. Heath*, for next of kin or legal personal representatives of next of kin of several of the brothers and sisters who survived the testatrix:—

The word "or" must be read as "and," and accordingly there is an intestacy: *Read* v. *Snell* (8); *Lachlan* v. *Reynolds* (9); *Re Walton's Estate* (10).

Secondly. Where there is a substantive gift to the "heir" of a

(1) 3 H. L. C. 524.
(2) 27 L. J. (Ch.) 651.
(3) 3rd Ed. vol. ii. p. 72.
(4) 16 Beav. 46.
(5) 5 Ch. D. 494.
(6) 1 Dr. & Sm. 497.
(7) 2 Beav. 308.
(8) 2 Atk. 642.
(9) 9 Hare, 796.
(10) 8 D. M. & G. 173.

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person, there the heir takes as *persona designata;* but where the gift is to the heir by way of substitution, the word "heir" must be construed to mean the person who would legally succeed to the property according to its nature or quality: *Mounsey* v. *Blamire* (1); *Hamilton* v. *Mills* (2); *Finlason* v. *Tatlock* (3); *Doody* v. *Higgins* (4); *Gittings* v. *M'Dermott* (5).

And the rule will apply although the property consists of a blended fund of realty and personalty. *Low* v. *Smith* (6), where the words were "legal heirs," is a direct authority on this point; and *De Beauvoir* v. *De Beauvoir* (7) is not inconsistent, for the gift in that case was an original gift, and it appears from the will that the testator's intention was to found a family estate; that all the property, both real and personal, should have the character of real estate, and that it should go to the "right heirs" as *personæ designatæ. De Beauvoir* v. *De Beauvoir,* and the authorities relied upon by Lord *St. Leonards* in that case, were not cases where the heirs took by substitution or to prevent a lapse, but where the heir-at-law took as *persona designata;* and in *De Beauvoir* v. *De Beauvoir, Gittings* v. *M'Dermott* was distinctly recognised as an authority. It is true that in several cases the heir-at-law has been held to take as *persona designata* a mixed property, but it has never been decided that the mere circumstance of realty being blended with personalty is sufficient to entitle the heir-at-law to take the whole. No doubt there is a *dictum* of Lord *Eldon's* in *Wright* v. *Atkyns* (8), as to the difficulty of giving different meanings to the same words in the same place, but there are also *dicta* on the other side in the cases before mentioned.

The word "heirs," then, in this case must, with respect to the personalty, be read as "statutory next of kin."

[They also referred to *Hawkins* on Wills (9).]

Willis Bund, for persons in the same interest, referred to *In re Steevens' Trusts* (10).

(1) 4 Russ. 384.
(2) 29 Beav. 193.
(3) Law Rep. 9 Eq. 258.
(4) 9 Hare, App. xxxii.; 2 K. & J. 729.
(5) 2 My. & K. 69.
(6) 25 L. J. (Ch.) 503; 2 Jur. (N.S.) 344.
(7) 3 H. L. C. 524.
(8) Coop. G. 111, 123.
(9) Page 91.
(10) Law Rep. 15 Eq. 110.

A. Comyns, for the widow of *C. W. Wingfield*, a deceased brother of the testatrix, who survived her:— Argument.

There is an intestacy, and the next of kin are entitled, because this is a gift to a class, with a substitutional gift to children, and the children cannot take unless the parent could likewise take: *Coulthurst* v. *Carter* (1); *Waugh* v. *Waugh* (2); *Christopherson* v. *Naylor* (3); *In re Porter's Trust* (4). If there be not an intestacy then the next of kin take the personalty under the word "heirs": *White* v. *Briggs* (5) and *Elton* v. *Eason* (6).

Merivale, for other next of kin:—

The word "heirs" may be construed differently as regards realty and personalty, although both properties are comprised in the same gift: *Herrick* v. *Franklin* (7).

Wingfield, for the trustees.

W. Pearson, in reply, referred to *Re Rootes* (8); *Gompertz* v. *Gompertz* (9); *Forth* v. *Chapman* (10); *Gwynne* v. *Muddock* (11).

HALL, V.C., referred to *Congreve* v. *Palmer* (12).

May 22. HALL, V.C.:— Judgment.

Several questions have to be determined by me in this case. It has been contended that the words "or their heirs" are to be read "and their heirs." Three cases were cited in support of this. The first was *Read* v. *Snell* (13), in which Lord *Hardwicke* said, "It was admitted by the Defendant's counsel that the word 'or' may be construed 'and,' as suppose a devise of land to *A.* or his heirs, it would be a devise in fee." In the supposed case there were no words to pass the fee, and this might perhaps have been considered a sufficient ground for such reading. That is not the case here,

(1) 15 Beav. 421.
(2) 2 My. & K. 41.
(3) 1 Mer. 320.
(4) 4 K. & J. 188.
(5) 2 Ph. 583, 590.
(6) 19 Ves. 73.
(7) Law Rep. 6 Eq. 593.
(8) 1 Dr. & Sm. 228.
(9) 2 Ph. 107.
(10) 1 P. Wms. 663.
(11) 14 Ves. 488.
(12) 16 Beav. 435.
(13) 2 Atk. 645.

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for although the will was made before the late *Wills Act*, the words of devise are sufficient to pass the fee without such an altered reading; and it is clear that the word "property" was intended to pass the fee in the devise to the trustees. Another of the cases was *Lachlan* v. *Reynolds* (1). In that case "or" was read "and," but this reading was warranted by the previous and subsequent parts of the will, particularly the clause where the words "and their heirs" occurred. The third of the cases was *In re Walton's Estate* (2). In that case the words "and assigns" occurred. Several of the cases cited in the argument on the other questions which I have to determine are authorities against the alteration of the word "or" into "and."

The next question I shall consider is, whether this case is, as has been contended, governed by *De Beauvoir* v. *De Beauvoir* (3). In *Low* v. *Smith* (4), Vice-Chancellor *Kindersley* says of that case (5): "It was there held that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that on the face of the will it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated, and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way and the personal estate in another." That seems to me to be a correct exposition of that case, and having read the whole of the judgment of Lord *St. Leonards* in *De Beauvoir* v. *De Beauvoir*, I do not consider that he lays down expressly or otherwise, that in all cases where there is a trust of real and personal estate for "right heirs" the property, real and personal, is to go to the heir-at-law taking real estate. In *Wright* v. *Atkyns* (6) Lord *Eldon* said it was very difficult to give a divided construction of the word "family." Lord *St. Leonards* says, referring to that case in *De Beauvoir* v. *De Beauvoir* (7): "In that case, therefore, which was a simple

(1) 9 Hare, 796.
(2) 8 D. M. & G. 173.
(3) 3 H. L. C. 524.
(4) 25 L. J. (Ch.) 502; 2 Jur. (N.S.) 344.
(5) 25 L. J. (Ch.) 504.
(6) 17 Ves. 255; 19 Ves. 299 Coop. G. 111; T. & R. 143.
(7) 3 H. L. C. 559.

devise of all the property 'to my family,' Lord *Eldon* thought it was very difficult to collect a different intention and to attribute to the testator an intent to give the real estate one way and the personal estate another." Lord *Eldon's* observation in *Wright* v. *Atkyns* (1) was commented upon by Lord *Cottenham* in *White* v. *Briggs* (2), and by Vice-Chancellor *Giffard* in *Herrick* v. *Franklin* (3). Each of those learned Judges did not feel the same difficulty as Lord *Eldon* seems to have felt. In *Elton* v. *Eason* (4) Sir *William Grant* said: "There is no reason why the same words may not be differently construed when they apply to different descriptions of property governed by different rules." It seems to me that cases like *Wright* v. *Atkyns* and *De Beauvoir* v. *De Beauvoir* (5), and the other similar cases, are, in reference to this difficulty, distinguishable from the case before the Court. Where, as in the present case, the trust or limitation is such that the heirs take as substitutes for, and as representing persons who would have taken if living, but who never could themselves take, the words "then living" excluding such persons from the class first described, the trust or limitation contains within itself that which requires that the property shall go to heirs upon whom the property would devolve by law, and that although such heirs do not actually take by legal succession. Consistently with this, although substitutes or representatives take, the words "or their heirs" are not substitutional, so as to render applicable the cases in which the question has been whether the gift was substitutional as distinguished from original: as appears from *Martin* v. *Holgate* (6) and cases there cited, and many other cases where that question came under consideration. The word "or" in the gift is, as observed by Sir *George Turner* in *King* v. *Cleaveland* (7), put in opposition to the words "then living." It was contended that *Low* v. *Smith* (8) was a gift of real and personal estate. The reports are not sufficiently full to shew that that case is directly applicable to the present. I think that that case may have been, and probably was, one in which the realty

(1) 17 Ves. 255; 19 Ves. 299; Coop. G. 111; T. & R. 143.
(2) 2 Ph. 583.
(3) Law Rep. 6 Eq. 593.
(4) 19 Ves. 77.
(5) 3 H. L. C. 524.
(6) Law Rep. 1 H. L. 175.
(7) 4 De G. & J. 477.
(8) 25 L. J. (Ch.) 502; 2 Jur. (N.S.) 344.

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was by the will converted into personalty, or that the two properties were not given together except in the disposition which had to be construed. I therefore rest my decision on the ground I have already mentioned, viz., that the proper construction of the words is that of heirs as regards the characters of the properties comprised in the gift, such reading involving a division of the properties between the heirs of realty taking the real estate and the heirs of personalty taking the personalty. The authorities are numerous that, as to personalty, the next of kin, according to the *Statute of Distributions* (including widows), are the persons to take when there is a trust of personalty only for "heirs." Many of those authorities were cited during the argument.

The next question to be considered is, when are the next of kin to be ascertained? As to this it is clear, upon the authorities, that as to any who predeceased the testatrix they must be ascertained at her death, and as to those who survived her, at the respective deaths of the persons dying.

The next question is, whether the heirs and next of kin respectively of a brother and sister of the testatrix who were dead at the date of the will, take? The brother was dead before the testatrix was born, and I think that one is not included in the class of "my brothers and sisters." As to the sister, I think that the heir and next of kin respectively do take: according to *In re Philps' Will* (1), which, if it is in conflict with the earlier case of *Congreve* v. *Palmer* (2), I think to be more in accordance with the current of authority.

Solicitor: *Joseph Mote*, agent for *John Torkington, Stamford.*

(1) Law Rep. 7 Eq. 151. (2) 16 Beav. 435.

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DICKINSON *v.* DICKINSON.

V.-C. H
1878
June 20.

[1876 O. 42.]

Will—Bequest of Leaseholds at C.—After-acquired Leaseholds at C.—Wills Act, s. 24*—Contrary Intention—Bequest of Share of Rents and Profits to Son, whether for Life or a longer Period.*

J. O., who died in 1860, by will made in 1859 gave to trustees all his estates of which he should be seised or possessed at the time of his decease, upon trusts as to the residue of his personal estate to convert into money, pay debts (except such mortgage debt as should be charged on the leasehold estate at C. [occupied as a farm] bequeathed to his son), invest, and pay the income, and the rents of the estates to his wife for life or widowhood, she maintaining his children, provided that if his son should attain the age of twenty-one before he should become entitled in possession to the estate at *C.*, he should be paid by the trustees, as his share of the income, £40 annually from his majority to the death or marriage of his wife, and after either event they were to assign his leasehold property at *C.* (charged with the payment of mortgage debts charged thereon, and also with an annuity of £9 charged thereon) unto his son. The wife was to be allowed to occupy the farm at *C.* until her death or marriage, for the benefit of herself and children. *J. O.* was, at the date of his will, possessed of two leaseholds at *C.*, one charged with an annuity and the other with a mortgage debt, and he was the owner of real estate at *B.* In October, 1859, he purchased another leasehold adjoining his leaseholds at *C.*, and in November, 1859, he sold his estate at *B.* and received the purchase-money, but died suddenly before the completion of the purchase of the leasehold at *C.*

The son attained the age of twenty-one and died before his mother:—

Held, that the legal personal representative of the son was entitled to be paid £40 a year until the death of the testator's widow or marriage; and that the after-acquired leasehold at *C.*, there being no contrary intention shewn, within the meaning of the *Wills Act* (1 Vict. c. 26), s. 24, formed part of the leaseholds at *C.* which the testator possessed at his death, and which he specifically bequeathed to the son.

Affd 6 Ch App 22.

Statement.

THIS was a creditors' suit for the administration of the estate of *James Matthew Ord*, who died in December, 1875, intestate, leaving two infant children surviving. Upon the Chief Clerk's certificate, questions arose as to the construction of the will of the intestate's father, *James Ord*, who died on the 16th of May, 1860, and who by his will, dated the 28th of March, 1859, after appointing two trustees and executors, gave unto them, their

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heirs, executors, and administrators, all his freehold and leasehold, and all his personal estates, of which he should be seised or possessed at the time of his decease, upon trust to permit his wife to have the use of his furniture and effects which should be in his dwelling-house at the time of his decease, for the joint benefit of herself and his children during her life and widowhood, and as to all the residue of his personal estate, to convert the same into money, and after payment of debts and funeral and testamentary expenses (except such mortgage debt as should be charged on his leasehold estate at *Chesterwood*, thereinafter bequeathed to his son *James Matthew Ord*), to invest the same as therein mentioned, and pay the interest, dividends, and annual proceeds of the personal estate, and the rents and profits of the real and leasehold estate, unto his wife for her life if she should continue his widow, she thereout maintaining his children living at his death, provided that if his son should attain the age of twenty-one years before he should become entitled in possession to his (the testator's) estate at *Chesterwood*, thereinafter bequeathed to him, he should be paid by the trustees, as his share of the same income, £40 annually from the period of his majority to the death or second marriage of his wife, and after her decease or future marriage, in trust to assign all his leasehold houses, lands, and premises, situate at *Chesterwood* (charged, nevertheless, with the payment of all mortgage debts charged thereon, and "also with the payment of the annuity of £9 now charged thereon in favour of my sister"), unto his son *J. M. Ord*, his executors, administrators, and assigns, for his and their own use and benefit. There was a gift over of this property in case the son should die under twenty-one years of age without leaving children, and then the testator directed his trustees to sell all his real and leasehold estates ("except my leasehold property hereby bequeathed to my said son,") as therein mentioned, and stand possessed of the proceeds of those estates and of his personal estate upon trust for all his children (exclusive of his said son) living at the time of his decease who should attain the age of twenty-one years equally. The testator declared that if his wife should desire to carry on his business of a farmer on his estate at *Chesterwood* for the joint benefit of herself and his children, she should be at liberty to do so until her death or

future marriage, and the trustees were to allow her to occupy the farm and to take all the stock, live and dead, which should be upon it at the time of his decease, and upon her death or second marriage the trustees were to sell such stock for the benefit of his children (exclusive of his said son.)

James Ord had at the date of his will one son and three daughters, and was at that time possessed, 1, of a leasehold property at *Chesterwood*, held under a lease dated the 2nd of October, 1654, for a term of 500 years, which he derived from his grandfather, and which was subject to the payment of the annuity of £9 above mentioned; 2, of another leasehold property at *Chesterwood*, adjoining the former, held under a lease dated the 2nd of October, 1654, for a term of 500 years, and which he purchased on the 8th of November, 1858, and afterwards mortgaged to secure the payment of £180; 3, of an estate of freehold and copyhold called *Barker House*, situate at *Hexham;* 4, of some freehold and leasehold houses at *Haydon Bridge;* and, 5, of farming stock, furniture, and household effects at *Chesterwood*. After the execution of his will, *James Ord*, on the 12th of October, 1859, entered into a contract for the purchase, at the price of £1900 (£200 of which he paid as a deposit), of another leasehold property, which was also situate at *Chesterwood*, and adjacent to the leaseholds to which he was entitled at the date of his will. The purchase was to be completed on the 13th of May, 1860. In November, 1859, the testator sold his property called *Barker House* (the principal property devised by him in favour of his younger children) for £2150, and on the 12th of May, 1860, that sale was completed and purchase-money received. The 13th of May, the day originally fixed for the completion of his own purchase, was a Sunday, and consequently the 15th of May was afterwards fixed, but on the 14th the testator was suddenly stricken with apoplexy, and died on the 16th. The purchase was subsequently completed by the trustees and executors, and the property was assigned to them.

The testator left his widow, and son, and three daughters (who had attained twenty-one years of age) surviving. The questions were whether the leasehold property purchased after the execution of the will passed to the son under the specific bequest, or to

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the daughters under the residuary bequest, and whether the annuity of £40 ceased on the son's death, or whether the administrator of his estate was entitled to it.

W. Brodrick, for the Plaintiff, stated the facts of the case.

Dickinson, Q.C., and *Armstrong*, for the Defendant the administrator, after referring to the cases of *Cole* v. *Scott* (1) and *Castle* v. *Fox* (2), submitted that in construing the will of *James Ord* it must be read as if the word "now" in the description of the annuity as "now charged thereon" did not refer to the date of the will, but to the date of its coming into operation—the death of the testator, and therefore, under the circumstances which had happened, the son or his estate was entitled to £40 a year until the death of the widow; and also to all the leasehold property at *Chesterwood* which the testator was possessed of at the time of his death.

Eddis, Q.C., and *Oswald*, for the Defendant the widow:—

That the after-acquired leasehold property did not pass under the specific bequest of leasehold property to the son. The 24th section of the *Wills Act* (1 Vict. c. 26) enacted that every will should be construed with reference to estates comprised in it to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention should appear by the will. The question is whether it can be gathered from all the circumstances existing at the time when the testator made his will that there was not an intention on his part that any after-acquired property should pass to the son. That is the principle laid down by Lord *Cottenham* in *Cole* v. *Scott* (3). What the Court must look at is the general intention, and consider whether it is sufficient to shew a contrary intention, though not so expressed within the meaning of the section. On a point of this kind parol evidence is admissible. The leaseholds at *Chesterwood* which were referred to at the date of the will, and bequeathed to the son, were subject to an annuity and to a mortgage. The testator was occupying that property as a farm, and he gave

(1) 1 Mac. & G. 518, 522. (2) Law Rep. 11 Eq. 542.
(3) 1 H. & T. 477, 524.

power to the trustees to allow his wife to occupy it, and to carry on the business of a farmer after his decease for the joint benefit of herself and all the children. The after-acquired property he never occupied, and there is no indication of intention in the will, or evidence, that he would add it to his farm, though it was quite true that the lands adjoined. That is the great distinction between this and other cases. The testator gave his leaseholds to his son "now" charged with the annuity and also charged with the mortgage, and did not intend to give the other leasehold to him. There is in the use of the word "now" and the other circumstances quite enough to enable the Court to hold that there was a contrary intention: *Webb* v. *Byng* (1). *Cole* v. *Scott* (2) is an authority clearly in favour of the widow's claim; and the 24th section should receive a liberal interpretation to support it. It cannot be contended that when a testator referred to particular leaseholds he meant to give the property which he had at the date of his will, or should have at the time of his death. The testator by his will made a fair apportionment of the whole of his property amongst all his children, and that also shewed that he could not intend to give this after-acquired leasehold to his son.

As to the annuity, that was a gift to the son for his personal advantage, and it could not be made to extend to a period beyond his life: *Savory* v. *Dyer* (3).

There is no authority to support the view that if the son predeceased his mother the annuity ought to be continued to his legal personal representative. An annuity given to *A. B.* is only for his life, and if it were intended to extend it beyond, there must be words used other than executors and administrators, to do so.

[The cases of *Hutchinson* v. *Barron* (4); *Lady Langdale* v. *Briggs* (5); *In re Midland Railway Company* (6); *Doe* v. *Walker* (7); *Strevens* v. *Bayley* (8); *Bothamley* v. *Sherson* (9), were also referred to and commented upon during the argument.]

(1) 1 K. & J. 580. (5) 8 D. M. & G. 391.
(2) 1 Mac. & G. 518, 522. (6) 34 Beav. 525.
(3) Dick. 162. (7) 12 M. & W. 591.
(4) 9 W. R. 538; 6 H. & N. 583. (8) 8 Ir. C. L. Rep. 410.
(9) Law Rep. 20 Eq. 304.

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HALL, V.C.:—

I am of opinion that the sum of £40 was not given to the son as from his attaining the age of twenty-one years as an annuity at all, but as his share, as from that age, of the rents and profits of the estates, and from that time until he became possessed of the estate bequeathed to him that share was to be his absolutely. It was an acceleration of his interest in the estate. Upon the whole, I think that is a sounder construction of the will than giving him an interest limited to his life as an annuity. I do not forget that there is a provision in the will for the maintenance by the wife, out of the rents and profits, of all the children. Then as to whether the leasehold property, after-acquired, is included in the specific bequest to the son, I am of opinion that there is not enough to enable me to say judicially that there is a contrary intention shewn. In the original gift the words are all freehold and leasehold and all personal estates of which the testator was seised or possessed at the time of his decease upon the trusts mentioned, and then there is a direction to assign all his leasehold houses, lands, and premises situate at *Chesterwood*, unto his son absolutely. There are no words in the trust to assign the leasehold property at *Chesterwood* which limit the property there to that which he possessed at the date of his will. That being so, I must see whether there is anything elsewhere that does so; and what is relied upon is, that the son's legacy is charged with an annuity of £9 and a mortgage—that the property is divided into two parts, the one part charged with the annuity and the other with the mortgage; but I cannot collect from the language of the will, which is not perfectly accurate, that the charges do not affect the whole of the property, nor can I collect that the words "all my leasehold houses, lands, and premises," are to be read as "such of my leasehold houses, lands, and premises situate at *Chesterwood* as I am at the date of this my will possessed of." It is quite true that these are the charges which are mentioned, but I could not by reason of their existence narrow the disposition, even if there were a greater inaccuracy in the language of the will. It is no doubt in evidence that the mortgage debt affects only a part of the property, but I must give the words describing the bequest of the property their proper interpretation. Then it was suggested that the gift might be

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cut down because the testator gave power to the trustees to allow the widow to carry on the business of the farm until her death or future marriage, but I cannot include in that power only that property which the testator farmed at the time of his death. I must give full effect to the language of the will, and I hold that the annual payment of £40 was to continue until the intestate became entitled in possession to his share of the testator's estate, and that it is now payable to his legal personal representative during the life of the widow or her widowhood; and also that the after-acquired leasehold property at *Chesterwood*, which was purchased by the testator after the date of his will, forms part of the specific gift to the son freed from any liability for the unpaid purchase-money in respect of such leasehold property. As the interests of the Defendants are in conflict, each of them must have the costs of appearing on further consideration.

Solicitors: *Bell, Brodrick, & Gray*, agents for *L. C. Lockhart, Hexham.*

V.-C. H.
1878
July 24.

In re HODGSON, DECEASED.
HODGSON *v.* FOX.

[1875 H. 119.]

Legacy to Bankrupt Debtor—Set-off—Retainer—Dividend.

A week before the death of a testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bankrupt. The debt was never proved by the testatrix in her lifetime or by her executors after her death, nor had any dividend been declared in the bankruptcy.

Held (following *Cherry* v. *Boultbee* (1)), that the executors of the testatrix were not entitled to set off or retain the amount of the debt due to the testatrix against the share of the bankrupt; nor, under the circumstances, any amount in respect of dividend on such debt.

FURTHER CONSIDERATION.

Statement.

The testatrix, Mrs. *Emily Catherine Hodgson*, by her will, dated the 29th of December, 1862, gave all her residuary real and personal estate to trustees, whom she also appointed her executors,

(1) 2 Keen, 319; 4 My. & Cr. 442.

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upon trust for sale and conversion, and to divide the proceeds equally among her children.

Statement.

In the year 1869, she lent one of her sons, *E. H. Hodgson*, who was one of the trustees and executors of her will, the sum of £500. She died in February, 1875; no acknowledgment had been made of the debt since January, 1869, when *E. H. Hodgson* had given her a receipt for the loan as bearing interest at £5 per cent., and as payable by ten half-yearly payments, the last of which was payable in January, 1874; but nothing had ever been paid by him either on account of principal or interest. The testatrix left eight children, two of whom were lunatics. *E. H. Hodgson* had been adjudicated bankrupt in 1875, a week before the death of the testatrix, but the debt had never been proved, nor had any dividend been declared in the bankruptcy; and the question was, whether the trustees and executors of the testatrix were entitled to retain out of the bankrupt's one-eighth share of her estate the moneys due in respect of the debt, or anything in respect of any dividend in the bankruptcy.

Argument.

Dickinson, Q.C., and *Mander*, for the Plaintiff.

Marcy, for one of the residuary legatees:—

The general rule is, that when a legatee is indebted to the testator, the executor may retain the legacy in whole or in part, by way of set-off: *Jeffs* v. *Wood* (1); and this holds good, notwithstanding that the legatee may have become bankrupt: *Lee* v. *Egremont* (2), and *Bousfield* v. *Lawford* (3); *Williams* on Executors (4). *Cherry* v. *Boultbee* (5) will be relied upon as an authority that the rule does not apply as against the assignee of a legatee who becomes bankrupt in the lifetime of the testator, but in that case Lord *Langdale* overruled Sir *John Leach* in *Ex parte Man* (6), and doubts have been thrown upon the soundness of the decision: *Freeman* v. *Lomas* (7); *Williams* on Executors (8). Moreover, in *Cherry* v. *Boultbee* the bankruptcy of the legatee preceded the

(1) 2 P. Wms. 128.
(2) 5 De G. & Sm. 348.
(3) 1 D. J. & S. 459.
(4) 7th Ed. 1304.
(5) 2 Keen, 319; 4 My. & Cr. 442.
(6) Mont. & Mac. 210.
(7) 9 Hare, 109, 113.
(8) 7th Ed. 1307.

date of the will, and the will shewed an express intention to benefit the bankrupt.

H. B. Buckley, for the committees in lunacy of two other residuary legatees:—

Notwithstanding the Statute of Limitations of 21 Jac. 1, c. 16 (the statute which is applicable to the present case), an executor may retain so much of a legacy as is sufficient to satisfy a debt due from the legatee to the testator, for that statute only bars the remedy and leaves the right untouched: *Courtenay* v. *Williams* (1); *Coates* v. *Coates* (2).

The soundness of the decision in *Cherry* v. *Boultbee* (3) has been questioned; but even if that case is an authority that the entire debt cannot be set off in case of the bankruptcy of the legatee, there is no authority against a set-off in respect of the dividends under the bankruptcy, and to this, at all events, we are entitled.

Plucknett, for other parties.

W. Pearson, Q.C., and *Oswald*, for the trustee in bankruptcy of *E. H. Hodgson*:—

Cherry v. *Boultbee* was affirmed on appeal, and *Ex parte Man* disapproved by Lord *Cottenham* (4). It was followed in *Bell* v. *Bell* (5), and is undoubtedly good law: *Robson* on Bankruptcy (6).

The right of the executor of a creditor is not a right of set-off, but rather a right to pay out of a fund in hand, and in this case the testatrix died a week after the bankruptcy of *E. H. Hodgson*, so that there was not at the time of the bankruptcy any right or claim on the part of the bankrupt's estate against her, nor any legacy or fund payable by her or her executor to the debtor.

While as to a dividend under the bankruptcy, neither the testatrix nor her executors have ever proved the debt, nor has any dividend ever been declared in the bankruptcy; so that the Court is not in a position to make any order to retain or set off any sum (which must be a speculative one) in respect of any possible dividend.

(1) 3 Hare, 539.
(2) 33 Beav. 249, 252.
(3) 2 Keen, 319; 4 My. & Cr. 442.
(4) 4 My. & Cr. 442, 448.
(5) 17 Sim. 127.
(6) Pages 339, 340.

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HALL, V.C.:—

I consider that this case is governed by *Cherry* v. *Boultbee*. As regards the retainer of anything in respect of a dividend under the bankruptcy, what appears from the two reports of *Cherry* v. *Boultbee* (1) does not satisfy me that it would be proper for the Court, in every case of a bankrupt legatee, to direct, in making its order, that some sum should be deducted by the executors of the creditor on account of a dividend. It may well be that in *Cherry* v. *Boultbee*, where the bankruptcy had occurred a year and a quarter before the death of the testatrix, the creditors claiming, the amount of the assets, the costs of the bankruptcy, and the amount of the dividend had been ascertained, so that the amount to be deducted or allowed could also be ascertained or was known. But in the absence of any such materials I am not able to make any working order as to the deduction of any sum whatever in respect of a dividend upon this debt.

The whole of the bankrupt's share must accordingly be paid to his trustee without any deductions.

Solicitors: *J. S. Ward; J. B. Hocombe; Crook & Smith.*

(1) 2 Keen, 319; 4 My. & Cr. 442.

MASTERS *v.* PONTYPOOL LOCAL GOVERNMENT BOARD.

FRY, J.
1878
May 13.

[1876 M. 368.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 158—*Local Government Board—Rebuilding—Depositing Plans—Approval—Allowing Work to proceed—Pulling down—Notice.*

The owner of a house after having, in accordance with a by-law of the Local Government Board, left, on the 16th of October, a plan of an intended new building, the local board passed a resolution that the plan was approved of, and that he should be offered £40 for certain land of his thrown into the street. He refused to accept the £40 but proceeded with his works, and by the 26th of October had pulled down the front wall of his house. On the 27th of October the board passed a resolution abandoning the terms before offered, and requiring him to set his frontage further back. This notice was given under sect. 155 of the *Public Health Act*, 1875, as on the front of a house having been pulled down. On the 27th of November the owner of the house proceeded with his building, and on the 21st of December he was served with notice to pull down his new building:—

Held, that the local board having approved of a plan, and having allowed a house-owner to proceed and pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down:

Held, that where a local board has not, during the month prescribed by the *Public Health Act*, s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan.

A local board cannot, under sect. 158, pull down a building without giving the owner an opportunity of shewing cause why it should not be pulled down.

Statement.

GEORGE MASTERS, the Plaintiff in this case, was the owner in fee simple of an inn at *Pontypool*, called the *Greyhound Inn*, built upwards of fifty years ago. In June and July, 1876, he had made alterations in one part of his inn, when negotiations as to throwing a part of it into the road were carried on between him and the *Pontypool* Local Government Board, and an offer was made to him which he refused.

In September, 1876, he began to pull down the rest of the inn, and on the 29th of September the local board served him with the following notice, signed by the clerk to the board:—

"I am instructed by the *Pontypool* Local Board to request you to forward me for their inspection a detailed plan and section of

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the premises now in course of erection at the *Greyhound Inn*, and also request you to discontinue building until the plan has received their seal and sanction."

This notice appeared to have been given under the 26th by-law of the local board, requiring every person who should intend to erect any new building to give notice in writing at the office of the local board of their intention, and at the same time leave at the said office plans and sections of the intended new building, and also leave a block plan shewing the levels and certain other things specified. The 155th, 158th, and 159th sections of the *Public Health Act*, 1875, were relied on (1).

(1) 38 & 39 Vict. c. 55, s. 155: "When any house or building situated in any street in an urban district or the front thereof has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building or the front thereof to be built or rebuilt in the same situation shall be erected, and such house or building or the front thereof shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation in case of dispute to be settled by arbitration in manner provided by this Act."

Sect. 158: "Where a notice, plan, or description of any work is required by any by-law made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed.

"Where an urban authority incur expenses in or about the removal of any work executed contrary to any by-law, such authority may recover in a summary manner the amount of such expenses either from the person executing the works removed or from the person causing the works to be executed, at their discretion.

"Where an urban authority may, under this section, pull down or remove any work begun or executed in contravention of any by-law, or where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken."

Sect. 159: "For the purposes of this Act the re-erecting of any building

There was a conflict of evidence whether the front wall of the hotel was at this time pulled down, and in the opinion of the Court the front wall was then standing up to the first floor except a space left for a cart, so that the case did not then come within the terms of sect. 159. On the 16th of October, 1876, *Masters* sent to the clerk of the local board a plan shewing the new building as set back a certain distance. On the 17th of October the local board, at a meeting, passed a resolution that the line of building should be erected as shewn in the plan sent in, and that the local board should offer *Masters* £40 for compensation for the land given up for street improvement. Some of the members of the local board then waited upon *Masters* and tried to induce him to accept the £40 for the piece of land, but he refused.

According to the statements on behalf of the local board, *Masters* was not informed that this resolution had been passed; but he appeared to have received, on the 19th of October, from the office of the local board, a letter authorizing him to proceed with the building according to his own plans. He, in fact, did proceed and pulled down the rest of the front wall of the hotel and began to rebuild. This had been done before the 27th of October, when the local board held a meeting and passed a resolution: "That Mr. *Masters* not having accepted the £40 offered by the board as compensation for the land given up for street improvement (as shewn in the plan), those terms are now abandoned, and that the line of frontage will now be from Mr. *Masters's* present building to the main building of the *George Inn*." This would set back the building further than as shewn in his plan. Another interview then took place, and on the same day the local board gave *Masters* the notice following:—

"That the board, under sect. 155 of the *Public Health Act*, 1875, require you to keep back in a line with the buildings on either side, namely, your existing buildings and the main building of the

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pulled down to or below the ground floor, or of any frame building of which only the frame work is left down to the ground floor, or the conversion into a dwelling house of any building not originally constructed for human habitation, or the conversion into more than one dwelling house of a building originally constructed as one dwelling house only, shall be considered the erection of a new building."

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George Inn. And they are prepared to enter into negotiations for the land given up."

Masters thereupon ceased building, and on the 4th of November he received a letter from the local board requiring him to name an arbitrator for the purpose of fixing the price of the strip of land which the local board proposed to take, but *Masters*, being of opinion that the local board could not take the strip of land, refused to appoint an arbitrator. On the 27th of November *Masters* recommenced building in conformity with the plans which he had submitted to the local board. On the 19th of December workmen were sent by the local board to remove the new building, but nothing appeared to have been done by them, and on the 21st of December the local board served on *Masters* a notice to remove his building, and that if he did not they should proceed to do so.

Masters thereupon brought this action to restrain them, and for damages.

The local board brought a counter-claim for a declaration that *Masters* had erected his building in contravention of the *Public Health Act* and of the by-laws, and for an injunction restraining *Masters* from permitting the buildings erected by him to stand. One of the points relied upon by the local board was that *Masters* was, in violation of one of the by-laws, going to build over a small triangular space left between his property and that of the *George Inn*, and another point was, that he had not left sufficient space at the back of his building as required by one of their by-laws.

The action now came on for hearing; the evidence being by affidavit.

Argument.

North, Q.C., *Pritchard*, and *Simmonds*, for the Plaintiff:—

The plans were approved on the 17th of October, and the board could not after that disapprove merely because the Plaintiff would not take £40 for compensation. The first disapproval was on the 27th of October, at which time the board was precluded from disapproving by their previous conduct. The pulling down has not brought the Plaintiff within sect 155: *Slee* v. *Corporation of Bradford* (1). Moreover, the board has no right to pull down a

(1) 4 Giff. 262.

building without hearing the owner: *Cooper* v. *Wandsworth Board of Works* (1); and the board must approve or disapprove within a reasonable time: *Hall* v. *Nixon* (2); *Baker* v. *Mayor of Portsmouth* (3). Most of these defences are mere afterthoughts, and ought not to be allowed to prevail.

Argument.

Kekewich, Q.C., and *A. T. Lawrence*, for the Defendants:—

The right to fix a line depends on sect. 155 of the *Public Health Act*, and does not arise until the building has been pulled down within the terms of sect. 159, and therefore the objection as to delay falls to the ground. The statutes are for the benefit of the public, and must be construed accordingly: *Kerr* v. *Corporation of Preston* (4). The board did disapprove within a month, which was the proper time.

[FRY, J.:—You are asking me to prescribe a line, and you have not offered compensation.]

That is not necessary in order to enable the board to prescribe a line, and the compensation may be recovered at any time. As to any damages, the Plaintiff has altered his plans and created the difficulty.

North, in reply as to the damages.

Judgment.

FRY, J.:—

This is an action brought by the Plaintiff to restrain the Defendants from pulling down his house and for damages. The question I have to decide is, whether the Defendants had a right to require the Plaintiff to observe the line of building prescribed by them on the 27th of October, 1876. Many objections to that right have been taken by the Plaintiff.

[His Lordship then stated the facts of the case, and said that upon the evidence he found that on the 16th of October, when the plan was sent in, the front wall was not pulled down, but was left standing (except a space left for a cart) up to the first floor.]

That was the position which continued from the end of September to the 16th of October, when the plan was submitted by

(1) 14 C. B. (N.S.) 180.
(2) Law Rep. 10 Q. B. 152.
(3) 3 Ex. D. 4.
(4) 6 Ch. D. 463.

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the Plaintiff to the board. On the 17th of October, the plan was laid before the board, and it becomes a question what they did in regard to the plan; but I think they must be supposed to have done their duty, and a resolution was passed on the 17th of October, as follows: "That the line of building be erected as shewn in the plan drawn by Mr. *J. F. Williams*, and that the board offer Mr. *Masters* £40 for compensation for the land given up for street improvement." Now the provisions contained in sect. 155 of the *Public Health Act*, 1875, are as follows.

[His Lordship then read sect. 155 of the *Public Health Act*, and continued:—] From my finding, in regard to the position of the building on the 16th of October, I am of opinion that circumstances had not arisen which entitled the board at that time to prescribe the line. Then on the 19th of October, Mr. *Stephens*, the clerk, wrote to the Plaintiff a letter authorizing him to proceed with his building in conformity with the plans submitted to the board on the 17th of October. It has been suggested that this letter was written in mistake by a friend of *Stephens*, but it seems to me very difficult to give much weight to that statement, and it appears to me that the line was prescribed by the board, and was communicated by letter to the Plaintiff. That being so, the Plaintiff resumed his work and caused the remainder of his front wall to be pulled down, and began to rebuild. The wall was down, and the foundations were put in by the 27th of October, on which day the board again met, and they then passed the following resolutions:—[His Lordship read them.] The question is, whether the board had power to pass these resolutions, which purport to alter the line previously prescribed by them.

The ground for abandoning the previous resolution is placed upon the refusal by the Plaintiff of the £40, and the question again is, whether the board could on that account alter the line they had prescribed. The jurisdiction of the board on the 27th of October could only arise from the pulling down by the Plaintiff of his front wall, and in my judgment that pulling down was induced by the resolution of the 17th of October, and I think that such a course of conduct is contrary to common fairness. The case of *Slee* v. *Corporation of Bradford* (1) shews, that where a local

(1) 4 Giff. 262.

board has by means of plans approved of, or otherwise prescribed, a line of street, and has allowed a landowner to act upon the line so prescribed by them, they cannot afterwards prescribe another line. On that ground alone, I think the Plaintiff entitled to relief.

There are numerous other objections raised by the Plaintiff. First, that under the 155th section the urban authorities must make a tender of compensation at the same time, and that none was made, though negotiations took place between the board and the Plaintiff; but I do not go the length of saying that the tender must be made at the same time. Secondly, that the board was on the 27th of October unable to prescribe a line of street, because the rebuilding had gone too far; but I doubt if the evidence would justify that conclusion. I do not, however, determine the case on either of these grounds, but because, upon weighing the whole facts of the case, the result, as it appears to me, is that the prescription of the 27th of October was invalid.

Then as to the defence set up. The Defendants say that the Plaintiff had not submitted plans, and they could therefore proceed to pull down his building. This power is claimed by them under sect. 158 of the *Public Health Act*, 1875 :—[His Lordship read the section.] The Plaintiff deposited his plan on the 16th of October. The letter of the 19th of October is not in itself very distinct as to plans; but in my opinion it permits a building to be erected in accordance with the plan. Now, a man who has been told that he may proceed with his building in accordance with the plan which he has submitted, may well say that his plan has been approved of. But further than that, the board did not actually object. They were bound to approve or disapprove within a month, and they are consequently in this dilemma. Either they have by the resolution of the 17th of October signified their approval of the plan submitted to them, or they have not signified their objection within one month. In either alternative they cannot now succeed. Then as to the block plan, no doubt the by-laws require a block plan to be deposited; but this objection was not taken until after the suit was commenced, and a letter of the 13th of December, written by the board to the Plaintiff, did not require a block plan. It would be unfair to allow an objection of that kind to prevail, and that defence also fails.

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Then as to the Plaintiff's deviation from the plan. The plan deposited shewed a small triangular space left between the *Greyhound* and the *George;* but in November an arrangement was made between the Plaintiff and the owner of the *George Inn*, by which that space was to be built over, thereby getting rid of a damp useless corner, and giving support to the *George*. The building in December shewed that this was to be done, but the notice of the 21st of December does not point this out, and the objection was never made until after this action was brought. In my opinion, such an objection cannot be allowed to prevail. But it is further to be observed, as to the last two heads of defence, that the board ought, before proceeding to pull down the building, to have called on the Plaintiff to shew cause why it should not be pulled down. A local board has not authority at once to pull down buildings on the ground of plans not having been deposited, or the deposited plans not having been complied with, and before taking any such step the board must call on the owner of the house to shew cause. *Cooper* v. *Wandsworth Board of Works* (1) shews that the board is not to exercise its summary powers without giving the landowner an opportunity of shewing that they are not required.

In my opinion the Plaintiff is right in coming here, and the only remaining question is as to the damages. The Plaintiff himself at first put them at £5; he has since sought to recover more as damages consequent on the delay in completing his building. I should be sorry to encourage people in conducting operations in opposition to the local board, but I think that the Plaintiff might have gone on with his building, and that there was only a trifling damage. I cannot give him more than £5. The form of the injunction will be according to the prayer of the claim.

It remains to deal with the counter-claims. In support of them, two points were raised; first, the Plaintiff's building over the wedge-shaped space lying between his building and the *George Inn*. But my previous observations dispose of that objection. Moreover, I think that the board could not proceed to pull down on this ground without first giving the Plaintiff the opportunity of being heard; and if I am to be the judge, I find that the building over that wedge-shaped space was proper.

(1) 14 C. B. (N.S.) 180.

The next point raised is want of space in the rear of the building. This objection is raised under one of the by-laws, and was not taken until after the action was begun, nor has the board ever given the Plaintiff an opportunity of shewing cause. The objection was merely an afterthought, and I shall not attend to it.

The counter-claim will be dismissed with costs, and the Plaintiff must have the costs of the action.

Solicitor for Plaintiff: *J. F. Raw*, agent for *R. Graham, Newport, Mon.*

Solicitors for Defendants: *Few & Co.*, agents for *Greenway & Bytheway, Pontypool.*

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[1872 R. 21.]

Mining — Winning — Working — Expenses — Profits — Allowances — Bad Debts.

By a deed of grant and license the licensee was empowered to work and win the coal mines under certain lands, and, out of the profits to arise by the sale of the coals, to reimburse himself all expenses of the winning thereof; and after full payment of such expenses of winning the coal mines the licensee was to pay the licensor a sum of money in respect of the coals raised as therein mentioned.

The licensee reached the coal mines by a driftway from an adjoining colliery, and worked the coal:—

Held, that the coal was won, according to the meaning of the deed, on the day when it could be worked through the driftway, and that no expenses subsequently incurred could be included in the expenses of winning:

Held, that the expense of the driftway was to be paid out of the profits, though it had been used for the purposes of the adjoining colliery:

Held, that in estimating the profits out of which the expenses of winning were to be reimbursed, all the expenses of working and selling the coal, including bad debts, must be allowed.

Statement.

BY an indenture bearing date the 7th of March, 1775, and made between *Edward Montagu* of the one part, and *John Tempest* of the other part, the said *Edward Montagu* conveyed and assured to the said *John Tempest* and his heirs the one undivided fourth part of *Edward Montagu* in the manor of *Barmston*, in the county of *Durham* (except one undivided fourth part of and in all collieries, coal mines, seam and seams of coal lying under the lands in the said indenture particularly mentioned and described), unto and to

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the use of *John Tempest*, his heirs and assigns. And the indenture contained the following proviso:—

"That it shall and may be lawful for the said *John Tempest*, his heirs and assigns, at his and their own costs and charges, from time to time and all times for ever hereafter, by such ways and means as he or they shall think fit, to win and work all and every or any of the coal mines, seam and seams of coal, within or under the said lands and grounds hereinbefore particularly mentioned and described or any part or parts thereof, and, in the first place, to reimburse himself and themselves all such costs, charges, damages, and expenses whatsoever which he or they or any of them shall bear, pay, sustain, expend, or be put unto in and about the winning thereof, only by, with, and out of the profits to arise by sale of the coals which shall be wrought or gotten out of the said coal mines, seam and seams of coal as aforesaid; and from and after full payment made to the said *John Tempest*, his heirs, executors, administrators, or assigns, of all such costs, charges, damages, and expenses as he or they shall be at or put unto in winning the said colliery, coal mines, or coal mine, seams or seams of coal, that he, the said *John Tempest*, his heirs or assigns, shall and will pay or cause to be paid unto the said *Edward Montagu*, his heirs or assigns, such sum of money for and in respect of every one-fourth ten of coals, *Sunderland* measure, which shall be yearly wrought and gotten out of the said coal mines, seam or seams of coal, as shall from time to time be awarded by two indifferent persons conversant in the coal trade in the said county of *Durham*, by writing to be signed, sealed, and delivered by the said two persons, the one of such two persons to be from time to time nominated by the said *John Tempest*, his heirs or assigns, and the other of such two persons by the said *Edward Montagu*, his heirs or assigns, once in every five years on the 1st of January in every such fifth year whilst the said coal mine, seam or seams of coal, shall continue to be wrought by the said *John Tempest*, his heirs or assigns, as aforesaid; and the first of such nominations to be made on the 1st of January next after the said *John Tempest*, his heirs or assigns, shall have been paid out of the said profits all his and their costs, charges, damages, and expenses in and about such winning as aforesaid."

The estate and interest of *Edward Montagu* in these seams of coal had become vested in the Plaintiff, Lord *Rokeby;* and the estate and interest of *John Tempest* had become vested in the Defendant, Sir *George Elliot*, under a lease from the Marchioness of *Londonderry* dated the 5th of November, 1864.

Sir *G. Elliot* was the owner of the *Usworth Colliery*, which adjoined the *Barmston* estate, and had on the 15th of July, 1864, entered on one of the coal seams under the *Barmston* estate by means of a drift from the *Usworth Colliery*, and had thereby worked and carried away and sold the coal in the *Barmston Colliery*. There were three seams of coal in the *Barmston Colliery*, and Sir *G. Elliot* had run a drift into one of the seams, the *Maudlin Seam*, and had sunk a pit on another, the *Low Main Seam*, but had continued to work only the uppermost, or *Maudlin Seam*, as the *Low Main Seam* had proved not worth working. He had continued to work the *Barmston* coal through the *Usworth Colliery*, and had sold the coals together.

The Plaintiff had in 1869 discovered that the Defendant was working the *Barmston* coal, and had then claimed payments under the deed of 1775 in respect of the coals wrought and gotten out of the *Barmston Colliery*. Much correspondence took place as to the allowances and the appointment of arbitrators, and the original bill in this suit was filed in 1872, praying for accounts and for payment to the Plaintiff of what the Court should determine to be a proper royalty in respect of every fourth ten of coal got from the *Barmston Colliery*.

The suit now came to a hearing, and much evidence was adduced as to the meaning of the word "winning," and as to the expenses incurred. The principal questions argued were as to the time when the coal was won, and the allowances to be made to the Defendant for the cost of winning; and as to the manner in which the profits were to be ascertained, so as to determine when the Defendant was reimbursed the costs of winning.

The questions and the further facts relating to them are stated in the judgment given below.

Cookson, Q.C., and *H. A. Giffard*, for the Plaintiff.

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Kay, Q.C., *North*, Q.C., and *Williamson*, for the Defendant.

FRY, J., after reading the principal clauses of the conveyance, and stating the facts, and that the Defendant might have been treated as a trespasser before the 5th of November, 1864, continued:—

The first question I have to determine is as to the meaning of the proviso descriptive of the costs, charges, damages, and expenses which the licensees shall bear, pay, sustain, expend, or be put to in and about the winning of the coal mine, seam and seams of coal. Now that question, it appears to me, must be answered by inquiring what is the "winning," and upon that much controversy has arisen. On the part of the Plaintiff it is contended that the "winning" referred to in this proviso is a single act, a thing which must be done once for all, and can never be repeated. On the part of the Defendant it has been urged that the "winning" is a thing which may happen from time to time, and, therefore, is not a single act. In my judgment the contention of the Plaintiff is correct on this point. I think that the "winning" referred to in this instrument must be taken to be a single thing. It is quite true, as has been urged upon me on behalf of the Defendant, that the proviso gives power to the licensees from time to time at all times thereafter to win and work the coal mines; it is quite true that the words used in respect of that which is to be won are "coal mines, seam and seams of coal, within or under the said lands." But notwithstanding those expressions which no doubt countenance the view that winning may be a thing repeated from time to time, still it appears to me that that is not the true meaning of the expression. The scheme of the proviso draws a distinct line between the time when the profits of the working of the coal are to be applied towards the cost of the winning and the time when the whole of those profits taken by the licensee are to be calculated, he being liable to pay such sum as shall be assessed by the referees in the nature of a royalty (I do not say a royalty) for every one-fourth ten of coal. There is what is now often called a hard and fast line drawn between those two states of circumstances; and the rights of the licensor and licensee before and after the satisfaction of the cost of winning are different in every respect. But

if the costs of winning are a single thing, the satisfaction of which is to happen once for all, it follows that the winning itself must be a single thing, because if the winning could be done from time to time, the expenses of winning would accrue from time to time, and the expenses of winning would have to be satisfied from time to time.

There is another observation, that not only does the deed itself draw this line, and draw it with reference to the winning, but it provides that the first nomination of these quinquennial referees or valuers shall be made after the winning charges have been satisfied by the profits. But how can such a clause as that be applicable to a thing which is to arise from time to time? It appears to me, therefore, on the true construction of the deed, that winning is a thing which is to happen once for all.

What, then, is this single act of winning? I have, of course, had reference, in determining this question, to what appears to me to be the scheme and meaning of the proviso. I bear in mind, also, the definition which has been given of winning by both the Lord Chancellor and the Vice-Chancellor *James*, in the case of *Lewis* v. *Fothergill* (1). I think it enough to say that in this case I consider winning to mean the performance of all those conditions necessary for the continuous working for sale of the coal comprised in the *Barmston Colliery*. Now, the best evidence that can be afforded that the conditions *sine quâ non* to the existence of a thing are satisfied, is the existence of the thing itself; and here I find that on the 15th of July, 1864, the continuous working of coal in that colliery began for the purpose of sale. What is the inference? It is to my mind inevitably this, that on the 15th of July, 1864, the coal was won.

But then it is said that large outlays referable to capital account, the benefit of which, in fact, has been spread over several years, have been from time to time made after the winning, and it is said that it is highly unreasonable not to treat those as the expenses of winning, although they may have happened after that particular event. They would, it is said, have been expenses of winning if they had been incurred before the coal had been reached, and why are they not to be expenses of winning if they

(1) Law Rep. 5 Ch. 103.

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are incurred after? The answer appears to me to be this: As I have already pointed out, the winning is a single act, and it is not because there is capital expenditure for subsequent purposes of the colliery, that coal can be said not to be won. It is of common knowledge that the outlay of a very large amount of capital on works, the whole benefit of which is not reaped within one year, is an ordinary incident to enterprises and undertakings of this description. The present case affords an abundant illustration of that. Some three years after the collieries had been reached and the working had begun, it was found that the coal was of a highly dangerous description, and that it was necessary to increase the ventilation of the coal mine, and accordingly for that purpose only a new shaft was put down. It is said that that heavy outlay of capital ought to be charged as a winning expense. The answer, as it appears to me, is, that this is a common expense of working a coal mine after it is won. Such expenses occur from time to time during the existence of a colliery. If they are paid out of the winning the winning of a colliery can never be complete until the colliery itself has been exhausted. That is a conclusion which I think is at variance with the ordinary meaning of the word, and certainly with the intention of this deed. Therefore I consider that no such allowance can be made.

Having come to that conclusion, it appears to me that the most convenient course will be for me to call attention to the various charges which the Defendant has insisted upon as being costs of winning. The first charge relates to the stone drift through the first series of troubles. Those troubles were faults or dislocations of the strata, not in the *Barmston Colliery*, but in the *Usworth Colliery*, and in the neighbourhood of the pit. It is said by the Plaintiff that, inasmuch as the driftway which was pierced through those troubles was used for the purpose of the *Usworth Colliery*, no portion of the expenses of that driftway ought to be allowed as expenses of winning the *Barmston Colliery*. I do not think that that contention can be maintained. Upon the evidence before me I come to the conclusion that the driftway, with the necessary airways and the necessary gates, was laid down by Sir *George Elliot* substantially for the purpose of winning the *Barmston Colliery*. I have no doubt that the Plaintiff is quite right in saying, and it

is scarcely denied, if at all denied, that those ways when so constructed would be a very convenient mode of working a portion of the *Usworth Colliery*, and have been used accordingly, but I do not think that the mere subsequent user of the driftway for the benefit of the person who owns the other colliery will prevent him from treating that as a charge of winning the coal in this colliery. I therefore allow as part of the charges which the Defendant is entitled to, the sum of £210 expended in the year 1862, the sum of £217 0*s.* 11*d.* expended in the year 1863, and so much of the sum of £11 18*s.* 2*d.* expended in the year 1864 as was expended before the 15th day of July in that year. I disallow the expenditure in 1865, because, in my judgment, that was subsequent to the winning.

[His Lordship then proceeded to disallow the cost of making a certain waggon-way as not part of the costs of winning; and he allowed the costs of certain works executed before the 15th of July, 1864, and disallowed the costs of certain works executed after that day, and directed the expenses of certain other works to be apportioned. He disallowed the expenses of sinking the pit on the *Low Main Seam*, as it did not result in a winning. He disallowed the costs of the pit sunk in the year 1867 for the purpose of better ventilation, as the winning was effected without it, and the necessity for it did not arise until some years afterwards. His Lordship allowed the Defendant interest at the rate of 4 per cent. on the sums expended by him in winning the coal. His Lordship then continued:—]

The second question which arises is this. What is the meaning of "the profits to arise by sale of the coals which shall be wrought or gotten out of" these coal mines, and out of which the costs of winning are to be satisfied?

Now, here again two views have been presented. The Plaintiff says the profits to arise by the sale are the gross returns from the coal. The Defendant says they are not the gross returns, but the gross returns after deducting all working expenses, in which he says should be included not merely the wages of the workmen and the expenditure on stores, but just allowances in respect of bad debts, the interest on the capital expended by the persons doing the work, and an allowance for wear and tear and depreciation. It appears that the word "profits" may be used in both

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ways, and I have to consider what is the natural and probable meaning of it in this case. Now, I think there is something absurd in paying a man his winning expenses out of profits, but not allowing him to deduct his working expenses from his gross profits. You would be apparently indemnifying him in respect of one expense when you at the same time would be depriving him of that advantage by charging him with another expense. It is true, as has been urged by Mr. *Cookson*, that perhaps the referees might take that into account in estimating the amount of *quasi* royalty to be put on the coal raised, but I do not think that that is a satisfactory answer. I think the profits out of which the expenditure of the licensee is to be made good are what I may call a clear fund—a fund which is reasonably applicable to the winning expenses after satisfaction of everything in the nature of working expenses. Therefore I propose to declare in substance that the profits, according to the true construction of the deed, are the gross returns, less the working expenses, and that in such working expenses are to be included just allowances in respect of interest on capital expended, in respect of bad debts, and in respect of wear and tear of machinery. Perhaps I might say with regard to bad debts that I think it is reasonable to allow them; for, in the first place, I think the sale must be considered to have been a sale according to the ordinary mode of selling coal, which, no doubt, is to some extent on credit. In the next place, I think that if the sale had not been for credit the price would have been less, and therefore, to use a common expression, the thing is as broad as it is long. If the Defendant had had no bad debts he would have had to sell for less money, and if he sold so as to incur bad debts, he got nominally more money, although perhaps in the result he did not get above the same amount.

Then the next question is this. It appears that the coal raised from the *Barmston Colliery* has been throughout mingled by the Defendant with the coal from the *Usworth Colliery*. He says that he has so mingled it because it was of an inferior description and would not have been merchantable without so doing. But the fact that no separate sales have been made of this coal interposes a very great difficulty in the way of ascertaining what the market value was. No attempt has been made by the Defendant

to fix its price or to invoke the assistance of the Plaintiff in fixing its price. It is said that it is possible to ascertain what its value would be by an inspection of the remains of the coal in the colliery. I do not think that that would be satisfactory. The pillars in the colliery must undergo change from the effects of air and water, and I am not satisfied that there is any means now available by which, without incurring an expense which I do not think the Plaintiff ought to be put to, the true market value of coal sold from time to time can be ascertained. Moreover, it appears from the evidence that the coal from *Barmston* is not of a uniform value, and that as the workings have gone further the coal has got worse. How, then, can I ascertain, without a most elaborate and probably futile inquiry, the different values of the different portions of this coal? I think that the Defendant has placed himself in a position in which he has rendered it impossible for the Court satisfactorily now to ascertain the market value of the coal, and accordingly the doctrine of confusion does apply, and the *Barmston* coal must be taken to have been of the same value ton for ton as the coal which was sold.

His Lordship then directed the accounts to be taken accordingly, reserving further consideration; when the questions as to fixing the amount to be paid to the Plaintiff would if necessary be argued and decided.

Solicitors for Plaintiff: *Frere & Co.*
Solicitors for Defendant: *Williamson, Hill, & Co.*

C. J. B. 1878 May 27.

In re HAMILTON. *Ex parte* HAMILTON.

Bankruptcy—Order for Discharge—Bankruptcy Act, 1869, *s.* 48—*Proper Resolution of Creditors—Discretionary Power in Judge.*

Where a special resolution of creditors under the *Bankruptcy Act*, 1869, s. 48, has been properly passed, stating that in their opinion the bankrupt cannot justly be held liable for his failure to pay 10*s.* in the pound, and desiring his discharge, and the terms of the section are in other respects strictly complied with, the Court has no discretionary power to refuse the bankrupt's application for discharge.

Statement.

THIS was an appeal from a judgment of the Judge of the County Court of *Yorkshire*, holden at *Bradford*, refusing an application by the bankrupt for an order of discharge.

W. B. Hamilton, the debtor, an oil and grease manufacturer, was adjudicated bankrupt on the 24th of March, 1876. On the 11th of April following, the first meeting of creditors was held, at which it appeared from the statement of accounts then produced that the unsecured debts amounted to £17,811 16*s.* 8*d.*, and the assets to £1553 3*s.* 8*d.* Of the debts, those due to stockbrokers amounted to £12,185 16*s.* 8*d.*

A trustee was duly appointed.

The bankrupt duly passed his public examination, when it appeared that the deficiency in his affairs chiefly arose from extensive speculations in stocks and shares; the bankrupt rendered the trustee all the assistance he could, and gave him accounts shewing dealings during the three previous years amounting to the enormous sum of £4,800,000, upon which there had been great losses. The stockbrokers with whom the bankrupt had had transactions were examined before the Judge of the County Court at *Bradford* as to the bankrupt's dealings with them.

A dividend of 4*s.* 0¼*d.* was ultimately declared and paid.

The bankrupt applied to the trustee to summon a general meeting of creditors to consider the question of giving him his discharge. A general meeting of the creditors was held on the 18th of February, 1878, at which the following resolution was passed after due notice had been served on all the creditors:—

"That we assent to the bankrupt applying to the Court for an order of discharge although the bankruptcy has not been closed.

"That the failure of the said bankrupt to pay a dividend of 10*s.* in the pound has, in our opinion, arisen from circumstances for which the said bankrupt cannot justly be held responsible, and we desire that an order of discharge should be granted to the bankrupt."

Statement.

These resolutions were signed by every creditor excepting one, who was a creditor to the amount of £16 1*s.* 8*d.* only.

By an order dated the 5th of March, 1878, the trustee was discharged and the bankruptcy closed.

Notice of the bankrupt's intended application to the Judge for his order of discharge was duly advertised in the *London Gazette* and the *Bradford Observer*, and upon the hearing of the application on the 17th of March, though no creditor or other person appeared to oppose, the County Court Judge refused to grant the order, on the ground that it appeared from the proceedings on the file that the failure of the bankrupt to pay 10*s.* in the pound arose from losses incurred by him in gambling in stocks and shares; and that the creditors' resolution for his discharge was passed in the interest of the bankrupt, and not in due and proper exercise of the power given to the creditors by the *Bankruptcy Act*, 1869, s. 48.

There was no charge or suspicion of fraud or collusion.

Argument.

Winslow, Q.C., and *Wilberforce*, for the Appellant:—

The creditors have passed the statutory resolution to the effect that the failure to pay 10*s.* in the pound has resulted from circumstances for which the bankrupt cannot justly be held liable. The creditors are to be the judges of these circumstances if they know all the facts, *Ex parte Linsley* (1), and not the Court. The Court has no discretionary power under sect. 48 of the Act of 1869 to refuse the order for discharge where 10*s.* in the pound has been paid, or there has been, as here, a special resolution of the creditors, except under the circumstances provided for in the latter part of the section; *i.e.*, 1, default on the part of the debtor in giving up his property to his creditors, or, 2, in the case of a prosecution under "the *Debtors Act*, 1869;" and nothing of this

(1) Law Rep. 9 Ch. 290.

C. J. B. 1878 *In re* HAMILTON. *Ex parte* HAMILTON.

Argument.

kind has happened here. This question of the discretionary power of the Court under the *Bankruptcy Act*, 1861, s. 159, was at one time not quite settled, and in *Ex parte Glass & Elliot* (1) Lord Justice *Knight Bruce* differed from Lord Justice *Turner*, but Lord *Westbury*, in *In re Mew & Thorne* (2), after carefully considering *Ex parte Glass & Elliot*, decided that the bankrupt is, under sect. 159, entitled to an order of discharge, unless he be guilty of any of the offences mentioned in that section, and that the discretionary power supposed to have been vested in the Commissioners was gone. We submit that the County Court Judge has exceeded his powers, and that he had no discretionary power under the existing circumstances to refuse the order for discharge.

No one appeared to oppose on behalf of creditors.

Judgment.

BACON, C.J.:—

I need not say that it is with great hesitation that I differ from the ruling of so patient and learned a Judge as the Judge of the *Bradford* County Court.

My duty is to consider the discretionary power of refusing a debtor his discharge under the *Bankruptcy Act*, 1869, s. 48, and I am much obliged to Mr. *Winslow* for directing my attention to the principles governing this discretionary power in similar cases under the old Act of 1861, as laid down in the lucid and learned judgment of Lord *Westbury* in *In re Mew & Thorne*, where he decided that the discretionary power, however extensive it may have been previously to 1861, had been quite taken away, and that the Commissioners could only refuse the bankrupt his discharge for the reasons specified in the *Bankruptcy Act*, 1861, s. 159. The only question, therefore, now remaining, is whether, under the present administration, Judges in bankruptcy have any discretionary power to refuse a discharge other than that which is conferred upon them by the 48th section of the Act of 1869. Now the words of the 48th section are very clear and precise—much more so, indeed, than in many of the other sections; it says that such discharge shall not be granted unless it is proved to the Court that certain conditions have been fulfilled: first, that a dividend of 10*s.*

(1) 31 L. J. (Bkcy.) 73. (2) 31 L. J. (Bkcy.) 87.

in the pound has been paid or might have been paid; or secondly, "that a special resolution of his creditors has been passed to the effect that his bankruptcy or failure to pay 10*s.* in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire an order of discharge should be granted to him." If, then, a special resolution has been passed by the creditors stating that "in their opinion" —I cannot conceive words more distinct than that—the debtor is not justly to blame, and "that they desire" that he should be discharged, then there exists a very clear right on the part of the bankrupt to come to the Court and demand his discharge. But it does not end here, for the discretionary power comes in and provides that the Court may suspend or withhold the discharge if, on the representation of the creditors, it appears that the bankrupt, first, "has made default in giving up to his creditors the property which he is required by the Act to give up,"—a condition which it is not pretended exists here; secondly, that a prosecution has been commenced under the *Debtors Act*, 1869,—another circumstance that does not exist in the present case. So that, upon the plain reading of this clause in the statute, there is no discretionary power in the Court where the conditions mentioned are not applicable. It was intended by this section to give the creditors more power in the management of the bankruptcy than they had before. The learned County Court Judge seems to have thought it was his duty to consider the conduct of the debtor in his transactions as a trader, and said that the matter was pre-arranged, and that the resolution was passed in the interest of the debtor. "Pre-arranged" of course it was, because the bankrupt had to ask his creditors to meet and join in this resolution, but such a previous arrangement is no objection; and so of course the resolution was in the interest of the debtor, because it was greatly to his interest to get his discharge, and that is no valid objection to it. The learned County Court Judge seems also to have thought that because the debtor had been guilty of gambling in stocks and shares, there had been commercial misconduct, and that he was therefore right in withholding his discharge, but that is not the law. All that the statute requires is that the creditors shall express "their opinion" and their "desire"—by what conditions

C. J. B. 1878 *In re* HAMILTON. *Ex parte* HAMILTON. Judgment

they are influenced is practically unimportant—in the terms and on the conditions mentioned in this section, as they have done in this case, and then the bankrupt is entitled to his discharge. It is worthy also of observation that there is no complaint or charge of fraud made against the bankrupt, and it is contrary, therefore, to all principles of law to find him guilty of charges for which he is not even arraigned; but that point is not necessary for the decision of this case. But what I do decide is, that, upon the plain construction of the 48th section, beyond which I cannot go, and beyond which the County Court Judge could not go, the bankrupt is entitled to the order he asks. The order of the County Court Judge must therefore be discharged, and a new order substituted, declaring that the bankrupt is entitled to his discharge. The costs will come out of the estate.

Solicitors: *Singleton & Tattershall*, agents for *C. L. Atkinson, Bradford, Yorkshire.*

C. J. B. 1878 July 8.

Ex parte COCHRANE. *In re* SENDALL.

Practice—Time for appealing—Twenty-one Days from the Date of the Order—Bankruptcy Rules, 1870, *r.* 143—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15.

13CLD882-3

In construing the 143rd of the *Bankruptcy Rules*, 1870, the words "decision" and "order" mean the same thing; and the twenty-one days within which an appeal from a County Court to the Chief Judge must be brought are to be reckoned from the date of the settling and signing of the order.

The decision in *Ex parte Garrard* (1) does not apply to the case of an appeal from a County Court to the Chief Judge in Bankruptcy.

Ex parte Hinton (2) explained.

Statement.

THIS was an appeal from an order of the County Court of *Norfolk.*

The application was heard by the Registrar of the Court on the 17th of April, 1878, and the hearing was adjourned to the 26th of April, on which day the decision was given; but the order was not settled and signed by the Registrar until the 7th of May.

(1) 5 Ch. D. 61. (2) Law Rep. 19 Eq. 266.

The notice of appeal was dated the 27th of May, 1878.

W. S. Owen, for the Appellants.

E. C. Willis, and *Linklater*, for the Respondent:—

The appeal is out of time. Notice of appeal must be given within twenty-one days from the date of the decision; not from the date on which the order was drawn up: *Ex parte Hinton* (1).

Owen:—

Ex parte Hinton was decided on the 18th of January, 1875, before the passing of the *Judicature Act*, 1875. The time for appealing to the Court of Appeal from decisions of the *London* Court of Bankruptcy is now regulated by the Rules of Court, 1875, and not by the Bankruptcy Rules: *Ex parte Garrard* (2); where precisely the same objection was raised as is taken here.

The decision in *Ex parte Garrard* must apply no less to appeals from the County Courts to the Chief Judge; and by rule 15 of Order LVIII. the period of twenty-one days is to be calculated "from the time at which the judgment or order is signed, entered, or otherwise perfected": *In re Sillence* (3).

[BACON, C.J.:—The case before the Court of Appeal, in my opinion, has no application to the case before me.]

Willis, in reply:—

The reasoning in *Ex parte Hinton* applies to this case.

In *Ex parte Sillence* the point was not discussed, nor the objection taken.

BACON, C.J.:— Judgment.

In my opinion this objection cannot be sustained.

At the same time I think the decision in *Ex parte Garrard* has no application to the case of an appeal from a County Court to the Chief Judge. The Lords Justices of Appeal, acting under the Judicature Acts, did not mean to decide anything affecting the jurisdiction in bankruptcy. All they are stated to have held

(1) Law Rep. 19 Eq. 266. (2) 5 Ch. D. 61.
(3) 7 Ch. D. 238.

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amounts to this, that the Bankruptcy Rule, in so far as it applies to appeals from the Chief Judge, is superseded by the rules under the *Judicature Act*. That does not alter the practice in bankruptcy.

The order in this instance is in the plainest possible terms. It says that an appeal is to be brought "within and not later than twenty-one days from the said decision or order." The fallacy of Mr. *Willis's* argument is that he fixes the date of the drawing up of the order as the date from which the twenty-one days are to be reckoned. But the words of the rule are "from the said decision or order." The decision and the order are one and the same thing. One cannot speak of "the order" without at the same time mentioning or implying the date of the 7th of May. Until the 7th of May there was no order. Until the Registrar inserted in the instrument that very material part of it—the date—there was no order.

In the case of *Ex parte Hinton* (1) there had been an error on the part of the Registrar. The order, though dated on the 27th of November, stated that the application was made and disposed of on the 3rd of November.

In this case the appeal was entered within twenty-one days from the 7th of May, and was consequently in time. The hearing must proceed.

The appeal was then heard, and in the result dismissed with costs.

Solicitors for Appellant: *Ingle, Cooper, & Holmes.*
Solicitors for Respondent: *Dillon-Webb, Kelly, & Co.*

(1) Law Rep. 19 Eq. 266.

Ex parte CHESNEY. *In re* DEMPSTER.

C. J. B.
1878
July 29.

Liquidation—Discharge of Debtor—Jurisdiction of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-ss.* 9, 10—*Bankruptcy Rules*, 1870, *r.* 302.

The creditors of a liquidating debtor resolved that his discharge should be granted "on the certificate of the committee of inspection that he is entitled thereto." When the estate had been realized the committee refused to give the certificate. They alleged that the debtor had paid £5 to induce a person not to bid at a sale of his book debts by auction. The debtor did not deny this:—

Held (reversing the decision of the County Court), that the Court had no jurisdiction to order the Registrar to sign a certificate of the debtor's discharge.

Ex parte Royle (1) explained.

Statement.

THIS was an appeal from a decision of the Judge of the *Hanley* County Court.

On the 18th of August, 1876, *Robert Dempster*, a draper at *Newcastle-under-Lyme*, filed a liquidation petition. The creditors at their first meeting, on the 11th of September, resolved upon a liquidation by arrangement, and appointed *P. K. Chesney* trustee, and *James Douglas*, *William Cumming*, and *James Mellor*, three of the creditors, a committee of inspection. They also resolved "that the debtor's discharge be granted on the certificate of the committee of inspection that he is entitled thereto."

After the debtor's estate had been realized he made several applications to the trustee to report his discharge to the Court, but the trustee replied that he could not do so because the committee of inspection declined to give the certificate required by the resolution of the creditors. Ultimately the debtor applied to the Court for, and obtained an order calling upon the trustee and the committee of inspection to shew cause why they should not certify to the Court that he was entitled to receive his discharge, or why the Registrar should not grant the same to him in default of their doing so. In answer to this application, *Douglas* made an affidavit, in which he said that the committee were not satisfied

(1) 26 W. R. 216.

C. J. B. 1878 *Ex parte* CHESNEY. *In re* DEMPSTER.

Statement.

that the debtor had given the trustee all the assistance in the recovery and realization of his estate which he ought reasonably to have given, and that they did not think it would be in the interest of the creditors that he should receive his discharge. And the trustee deposed that the debtor had not given him all the assistance which he ought and could have given in the realization of his estate. And he said that he had sold the debtor's estate, which consisted principally of book debts, by auction, and that after the sale he had been informed by one *Thomas Robinson* that the debtor had paid him £5 to induce him not to bid at the sale. The debtor deposed that he had rendered the trustee all the assistance in his power in the realization of his estate, but he did not attempt to deny or explain the charge about the £5 paid to *Robinson*. The debtor then applied to the Court to grant him his discharge, and on the 5th of June, 1878, the Judge ordered that the Registrar should forthwith sign and grant to the debtor a certificate of his discharge, and that the trustee should pay the costs of and incidental to the preparation and filing of the certificate, and of and incidental to the application to the Court. The trustee appealed.

Argument.

Winslow, Q.C., and *Jeune*, for the Appellant:—

In a liquidation by arrangement the Court has no jurisdiction to grant the debtor a discharge; that is the function of the creditors: *Bankruptcy Act*, 1869, s. 125, sub-ss. 9, 10. And rule 302 enables the creditors to grant the discharge "subject to any conditions."

Either the granting of the discharge has been properly left to the committee of inspection, or no discharge has been granted at all. In either case the Court has no power to interfere. The Judge professed to follow the decision of this Court in *Ex parte Royle* (1). There the creditors had resolved that the debtor should have his discharge upon the trustee certifying that he had satisfied himself that the debtor had rendered all the assistance in his power in realizing the estate. The trustee refused to certify, and your Lordship, being of opinion that he had taken no steps to satisfy himself, ordered the Registrar to certify that the debtor

(1) 26 W. R. 216.

was entitled to his discharge. But there the trustee alleged no ground for his dissatisfaction, and the Court thought that he had not acted *bonâ fide*.

Argument.

E. C. Willis, for the debtor:—

The Judge simply followed the principle of the decision in *Ex parte Royle* (1). Just as in that case, there is no reason for the refusal of the committee to give the certificate. The trustee has not for a long time asked the debtor for any further information or assistance. It was not intended that he should be deprived of his discharge for ever; it was intended that he should have it when all his estate had been realized. That has been done. The only thing alleged against the debtor is that he paid £5 to induce an intending bidder not to bid at the sale. *Ex parte Royle* exactly applies. The power given to the committee of inspection ought to be exercised reasonably.

Judgment.

BACON, C.J.:—

One of the most prominent features of the Act is that it gives to creditors powers which they did not previously possess, the object being to enable them to come to an arrangement for the liquidation of their debtor's affairs which shall avoid bankruptcy. Nothing can be more plain than the provisions of sub-sects. 9 and 10 of sect. 125. The Registrar has no power to give a certificate of discharge except upon a report by the trustee that the discharge has been granted by the creditors. What is the meaning of the resolution passed in the present case? It assumes that thenceforth the debtor will do everything just and fair towards his creditors, that he will conform to all the rules in bankruptcy, and the committee of inspection are to be the judges whether he has performed these plain duties. I do not know what jurisdiction the Court of Bankruptcy has to deal with the discharge. My decision in *Ex parte Royle* was founded on another principle, viz., that the trustee in a liquidation stands in a fiduciary relation. He is intrusted with very large powers and must use them justly. In that case it appeared that the trustee had not discharged his

(1) 26 W. R. 216.

C. J. B. 1878 *Ex parte* CHESNEY. *In re* DEMPSTER. Judgment.

duty properly. There was no shadow of a reason way he should not have discharged his duty by satisfying himself that the debtor had rendered all the assistance in his power in realizing the estate, and therefore I ordered the Registrar to give the certificate. What the consequence of this debtor's paying the £5 to prevent a person bidding at the sale may have been I cannot tell; perhaps the committee of inspection can. But, taking that matter into consideration, they came to the conclusion that the debtor ought not to have his discharge. There is not a word of explanation or denial on the part of the debtor of this charge against him. I am of opinion that the Judge had no power to make the order, and it must be discharged. The Respondent must pay the costs.

Solicitors for Appellant: *H. B. Clarke & Son*, agents for *Terry & Robinson, Bradford, Yorkshire.*

Solicitors for Debtor: *Collyer-Bristow, Withers, & Russell*, agents for *R. A. Stevenson, Hanley.*

C. J. B. 1878 *Aug.* 5.

Ex parte TURQUAND. *In re* SHEPHERD.

Felony—Theft of Money—Imputation of Attempt to compound Felony—Effect of Evidence—Admission to Proof of Sum equal to the Amount stolen.

The bankrupt, who was a banker's clerk, having absconded on the 16th of March, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the same month the bankers received from the bankrupt a letter confessing thefts to the amount of £7852 19*s*. Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in *England.*

Conversations on the 19th, and again on the 22nd of March, between a partner of the bank and relatives of the bankrupt, were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to *America*, or elsewhere;" and on the latter occasion an offer having been made by the bankrupt's wife that the bankrupt should return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." It was also in evidence that after the conversation on the 19th, one of the relatives who was present had

an interview with the bankrupt in this country, since which he had disappeared.

The Registrar of the County Court having refused to admit to proof a claim of the bankers for the sum of £7852 19*s.* :—

Held, that there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen; and appeal allowed.

Affirmed by C. of A. 10 Ch. D. 666

THIS was an appeal from a decision of the *Greenwich* County Court, dated the 12th of July, 1878, whereby the learned Registrar refused to admit to proof a claim, dated the 11th of August, 1877, on behalf of *William Turquand*, the trustee in the liquidation of *Willis, Percival, & Co.*, bankers, against the estate of the bankrupt, *John Dawson Shepherd*, for a sum of £7852 19*s.*

Statement.

The bankrupt (whose adjudication was dated the 4th of May, 1877), was before and up to the date next mentioned a clerk in the employ of *Henry Willis, Samuel Tomkins,* and *Samuel Leith Tomkins,* partners, carrying on business as bankers under the firm of *Willis, Percival, & Co.*, in *Lombard Street.*

Suspicions having been aroused, directions were, on the 15th of March, 1877, given that the bankrupt's books should be looked into. On the following day, the 16th of March, the bankrupt absconded. Defalcations to the amount of some few hundred pounds were being discovered, when on Saturday, the 24th of March, the bankers received from the bankrupt a letter containing a confession that he had robbed the bank to the amount of £7852 19*s.*

On or about Monday, the 26th of March, instructions were given by the bankers, in pursuance of which a warrant for the apprehension of the bankrupt was, on Wednesday the 28th, placed in the hands of a detective, who proceeded to make a search throughout the country, but without success; the bankrupt not having been captured.

The grounds of the learned Registrar's decision in rejecting the proof were, that *Willis, Percival, & Co.* "did not take proper steps to prosecute" the bankrupt; and that instructions for the warrant were not issued from the 16th to the 26th of March; also that it appeared from evidence, practically uncontradicted, given by *Henry Roome* the brother-in-law, and *Thomas Gueyer Shepherd,* the brother of the bankrupt, that Mr. *Tomkins,* senior "was wholly adverse to a prosecution, and that he was, in fact, desirous that the

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Ex parte TURQUAND. *In re* SHEPHERD.

Statement.

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bankrupt should escape." Reliance was placed also on the decision in *Ex parte Elliott* (1), as shewing that there can be no proof on a felonious embezzlement before prosecution.

The trustee in the liquidation of *Willis, Percival, & Co.* appealed.

The following is the evidence upon which the decision turned.

Henry Roome, brother-in-law of the bankrupt, on behalf of the Respondent, the trustee in bankruptcy, deposed in examination to the following effect:—

Witness and *Thomas G. Shepherd*, the bankrupt's brother, on Saturday, the 17th of March, 1877, went to the bank and saw Mr. *Samuel Tomkins*, senior. They were told that there was £100 missing, and were desired to call again on Monday. On Monday, the 19th, they went, and again saw Mr. *Tomkins*, senior, who, after telling them that the matter was much more serious than they thought, suddenly asked witness, "Do you know where he is?" Witness said "No," and Mr. *Tomkins* said, "Ah! I do not wish to know," or to that effect. Being further questioned, witness added, "The words as near as I recollect were: 'My advice is that he should go out of the country, to *America*, or elsewhere'—something to that effect." Mr. *Leith Tomkins*, junior, then came in, holding in his hand a slip of paper on which were written four figures beginning, witness thought, with a 2, and said, "This is much more serious than we thought,"—or something to that effect—"I think we shall have to take legal proceedings," whereupon Mr. *Tomkins*, senior, replied: "Never mind, that need make no difference to what I have already told you."

On Thursday, the 22nd, witness, with the bankrupt's wife and brother-in-law, again called at the bank and saw Mr. *Tomkins*, senior. Mrs. *Shepherd* said she would use her influence to bring the bankrupt back to the bank so soon as she heard from him. Mr. *Tomkins* answered, "No, if he comes back here, we might have to take legal proceedings against him."

Thomas Gueyer Shepherd, the bankrupt's brother, confirmed the above evidence. His account of the conversation on Monday, the 19th, was that Mr. *Roome* said to Mr. *Tomkins*, senior, "Would you wish to see *John Shepherd?*" to which he answered, "No, if

(1) 3 Mont. & A. 110; 2 Deac. 179.

he is not already out of the country, let him get away as quickly as possible." Mr. *Tomkins* further said that it was not *John Shepherd* that the bank wanted; they wanted the papers. Witness's account of the conversation on the 22nd was that "Mrs. *Shepherd* offered Mr. *Tomkins*, senior, for *John Shepherd* to come and throw himself on the mercy of the firm;" whereupon Mr. *Tomkins* said, "No, if he did that we should be obliged to prosecute him, but of course," he said, "we should not allow him to remain in *England*, if we do it; if he were abroad, I don't suppose we should trouble further for him."

In examination Mr. *Tomkins*, senior, denied recollection of having used on Monday, the 19th, the expressions deposed to. He admitted saying it was not *John Shepherd* he wanted—he wanted the papers. He admitted that he might have said that if *Shepherd* were abroad, he did not suppose that the bank would trouble for him, supposing at that time (22nd of March) that there was not a sufficient necessity to put the extradition treaty in force against him. As to the expression, "throwing himself on the mercy" of the bank, witness deposed that what he said was to the effect that it was then undesirable he should come and throw himself on the mercy of the bank; it would place them in the painful dilemma of proceeding against a man who trusted to their generosity, or of letting a criminal escape.

Mr. *Roome* further deposed that on Monday, the 19th, after the conversation with Mr. *Tomkins*, he himself had an interview with the bankrupt, but that since that day he had not seen him, and did not know where he was.

Winslow, Q.C., and *Bush Cooper*, for the Appellant.

BACON, C.J., having heard the case opened, observed:—

The law cast upon the bankers the *onus* of endeavouring to bring the culprit to justice. I take the law to be plain enough. No doubt the obligation is thrown upon a man who is robbed to do his best to bring the person who has robbed him to justice, and if he uses all fair endeavours and fails, then he is not prevented from proceeding for any debt that is due to him in a civil Court. The question is, whether the claimant has neglected the duty

C. J. B. 1878 *Ex parte* TURQUAND. *In re* SHEPHERD.

which the law cast upon him? I think I had better hear the other side.

Argument.

De Gex, Q.C., and *Winch*, for the Respondent:—

The Appellant cannot have a civil remedy until there has been a prosecution, or until a prosecution has become impossible: *Ex parte Elliott* (1).

[BACON, C.J.:—Any kind of connivance or indulgence would, of course, be fatal to the claim.]

De Gex:—The principle as indicated by your Lordship is, that a man cannot have a civil remedy unless he has done his best to bring the criminal to justice.

Here the bankers did quite the contrary. The evidence shews that it was in consequence of Mr. *Tomkins* senior's advice that the bankrupt left *England*.

A conversation takes place between Mr. *Tomkins* senior and Mr. *Roome*, on the 19th of March; in the course of the same day Mr. *Roome* sees the bankrupt, and the bankrupt immediately leaves for *America*, and has not since been found.

Judgment.

BACON, C.J.:—

No doubt the case involves a principle of the utmost importance. The rule of law is clear and plain; it is the bounden duty of a man who is robbed—a duty which he owes to the State—to use all reasonable endeavours to bring the offender to justice before he sues for a civil remedy. That being the general principle, the circumstances of the case before me must be examined.

A confidential servant of the bank absents himself, and suspicions being aroused, his accounts are examined and it is found that £100 is deficient. A further inquiry takes place, and after a protracted inquiry it is found that his defalcations are much larger. But are not bankers to have a reasonable time in order that they may know what they are to do? One irregularity of £100 is discovered, and suspicion exists as to the misappropriation of much larger sums, which they are wishing to trace. A conversation takes place between the bankrupt's relatives and the bankers, and

(1) 3 Mont. & A. 110; 2 Deac. 179.

what is the upshot of that conversation? Mr. *Tomkins*, senior, speaking for himself alone, and not as a member of the firm—when it was suggested that the clerk should throw himself upon his mercy—bethought himself that if he consented, he might be deprived of the right to prosecute him; and I think it must be conceded that he said something of this kind: "I wish him to keep out of my sight and go to *America*, rather than that I should have the pain of prosecuting him." But beyond that slight conversation what promise was made and what act was done by Mr. *Tomkins* to deprive him of his right to prosecute or suspend his civil rights until after he had prosecuted? It is in evidence that he did all that could be reasonably expected from him to bring the clerk to justice. Even if the conversation to which I have alluded had the effect of enabling the clerk to place himself out of the reach of his creditors, it would not, in my opinion, be sufficient to suspend or forfeit any civil right on the part of the bankers. Mr. *Tomkins* takes out a warrant, which is put into the hands of persons especially conversant with these matters, and afterwards, the warrant is put into the hands of an officer, who does all in his power to bring the offender to justice. If it were an improper or incautious suggestion that the clerk had better go to *America*, I do not think that it is sufficient to justify the conclusion that Mr. *Tomkins* did not do his best to bring the offender to justice.

I am therefore of opinion that the objection to the proof does not rest upon sufficient grounds, and the appeal will be allowed.

The Appellant must have the costs of the appeal.

Solicitors: *Lawrence, Plews, & Baker; Brook & Chapman.*

END OF VOL. IX.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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ADMINISTRATION—*continued.*
different persons; and the devisees must contribute according to the value of their respective portions.—A testator, nearly the whole of whose real estate was subject to a mortgage debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate and in exoneration of his other real estate with the payment of all his just debts," and he devised another part of his real estate to his daughter:—*Held* (reversing the decision of *Hall*, V.C.), that there was no sufficient declaration of a contrary intention under *Locke King's Act*, and that both the devisees must contribute rateably to payment of the mortgage debt. *In re* NEWMARCH. NEWMARCH *v.* STORR - - - - - C. A. 12

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APPORTIONMENT—*Will—Bequest of Share of Profits of Business—Ascertainment of Profits—Legatee of Life Interest—Apportionment Act*, 1870—"*Dividends or other Periodical Payments.*"] A testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the net profits to *J. C.* during his life, and after his death to his widow during her life; and the testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but the same should be wholly in the discretion of the trustees, except that they should every January draw up a balance-sheet shewing the net profits during the year ending on the then preceding 31st of December.—The trustees carried on the paper, gave notice to *J. C.* and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to the 30th of June and the 31st of December in each year, and they did so divide the same up to the 30th of June, 1877.—On the 23rd of December, 1877, *J. C.* died, and his widow claimed the one-fourth share of the net profits of the half-year ending on the 31st of December, 1877:—*Held*, first, that upon the terms of the will the person to take a share of the profits must be living at the time when it was ascertained that there were profits to be divided; secondly, that the profits in question were neither "rents, annuities, dividends, or other periodical payments," within the meaning of the *Apportionment Act*, 1870; and, consequently, that that Act did not apply, and the widow was entitled to the whole profits of the half-year in question. *In re* Cox's Trusts - - - - - 159

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BANKRUPTCY—*Adjudication—Petitioning Creditor's Debt—Trustee for Absolute Beneficial Owner—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] Notwithstanding the provision of sect. 6 of the *Bankruptcy Act*, 1869, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity," the old rule in bankruptcy remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication of bankruptcy against the debtor, but the beneficial owner must join in the petition.—The rule, however, does not apply to a trustee for persons under disability. *Ex parte* Culley. *In re* Adams - C. A. 307

2. —— *Debtor's Summons—Absconding Debtor—Substituted Service—Jurisdiction of County Court—Bankruptcy Rules*, 1870, *r.* 61.] A debtor, who had resided in the district of the *Greenwich* County Court, absconded, and a creditor was unable to effect personal service of a debtor's summons upon him, or to discover that he had any residence other than his old one, at which he was not to be found:—*Held* (reversing the decision of *Bacon*, C.J.), that the *Greenwich* Court had jurisdiction to order substituted service of the summons. *Ex parte* North Kent Bank. *In re* Holdsworth - - - - C. A. 333

3. —— *Discharge—Bankruptcy Act*, 1869, *s.* 48—*Proper Resolution of Creditors—Discretionary Power in Judge.*] Where a special resolution of creditors under the *Bankruptcy Act*, 1869, *s.* 48, has been properly passed, stating that in their opinion the bankrupt cannot justly be held liable for his failure to pay 10*s.* in the pound, and desiring his discharge, and the terms of the section are in other respects strictly complied with, the Court has no discretionary power to refuse the bankrupt's application for discharge. *Ex parte* Hamilton. *In re* Hamilton - - 694

4. —— *Jurisdiction—Duty of Trustee—Order for Delivery of Possession of Land—Foreclosure—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 65, 72.] When a stranger to a bankruptcy is willing to submit to the Court of Bankruptcy the determination of his rights in relation to property of the bankrupt, it is improper for the trustee in the bankruptcy to raise objections to the exercise of jurisdiction by that Court. Such a person ought to be encouraged to submit to the jurisdiction.—*Quære*, whether the Court of Bankruptcy has jurisdiction to make an order for foreclosure.—Order made that the trustee in a bankruptcy should deliver possession of a house, of which the bankrupt had been weekly tenant, to the lessee of the house, who, as between himself and the bankrupt, was mortgagee of the lease from the bankrupt.—*Ex parte Dickin* (8 Ch. D. 377) distinguished.—Observations on *White* v. *Simmons* (Law Rep. 6 Ch. 555). *Ex parte* Fletcher. *In re* Hart - - - - C. A. 381

5 —— *Leasehold Property of Bankrupt—Omission of Trustee to disclaim—Possession taken by Trustee—Personal Liability of Trustee for Rent—Jurisdiction of Court of Bankruptcy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 20, 23, 24, 35, 72.] A trustee in bankruptcy who takes actual possession of leasehold property of the bankrupt, and does not, when called upon by the landlord so to do, disclaim the lease in the way provided by sect. 23 of the *Bankruptcy Act*, 1869, is personally liable for the rent which accrues due after he takes possession.—Sect. 35 of the Act only gives the landlord a right of proof for the proportionate part of the rent up to the date of the adjudication, but does not relieve the trustee from his personal liability.—*Semble*, the Court could not have decided this question in the absence of the submission of the parties. *Ex parte* Dressler. *In re* Solomon - - - C. A. 252

6. —— *Liquidation—Discharge of Debtor—Jurisdiction of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-ss.* 9, 10—*Bankruptcy Rules*, 1870, *r.* 302.] The creditors of a liqui-

dating debtor resolved that his discharge should be granted "on the certificate of the committee of inspection that he is entitled thereto." When the estate had been realized the committee refused to give the certificate. They alleged that the debtor had paid £5 to induce a person not to bid at a sale of his book debts by auction. The debtor did not deny this:—*Held* (reversing the decision of the County Court), that the Court had no jurisdiction to order the Registrar to sign a certificate of the debtor's discharge.—*Ex parte Royle* (26 W. R. 216) explained. *Ex parte* CHESNEY. *In re* DEMPSTER - - - - - 701

7. —— *Liquidation Resolutions—Registration—Misdescription of Debtor in Petition—Formal Defect—Amendment—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 82, 125—*Bankruptcy Rules*, 1870, *rr.* 208, 252, 257, 295—*Bankruptcy Forms*, 1870, *Nos.* 106, 111.] A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:—*Held*, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favour of a liquidation by arrangement ought not to be registered.—And an application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused. *Ex parte* JERNINGHAM. *In re* JERNINGHAM - - - - - C. A. 466

8. —— *Liquidation Resolutions—Registration—Bona fides of Creditors—Small Amount of Assets—Assets dependent on Result of Litigation—First Meeting of Creditors—Examination of Debtor—Power of Meeting to overrule improper and irrelevant Questions—Ultrà Vires Resolution—Discharge given to Debtor at Discretion of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.] Want of *bona fides* will not necessarily be imputed to liquidation resolutions however small the assets immediately available may be, if the debtor has substantial *bonâ fide* claims the subject of pending litigation.—*Ex parte Aaronson* (7 Ch. D. 713) distinguished.—The debtor, at a meeting of his creditors under a liquidation petition, is only bound to answer proper and material questions, and the meeting has power to prevent the putting of irrelevant or improper questions, or questions which are put, not in the interest of the creditors, but for a collateral object. But the decision of the meeting is subject to review by the Registrar or the Court.—The creditors cannot delegate to any one their statutory power of granting the debtor his discharge. A resolution doing this is *ultrà vires*. But the Registrar or the Court can strike it out and direct the other resolutions to be registered without it:—*Per James*, L.J.:—*Semble*, that the effect of rule 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bonâ fide*, the sole judges whether the debtor has given sufficient information as to his affairs.—The statement of affairs of a debtor who had filed a liquidation petition shewed that his unsecured debts amounted to £43,897, and his assets to £120. Besides this, he stated that he had two claims which were being prosecuted in two suits. As to one of them he said that he could not estimate its money value, but that there should be no difficulty in obtaining a very large sum, and as to the other he said that it was a claim for a considerable sum. At the first meeting of the creditors the solicitor and proxy of a company, who had been made Defendants to one of the suits, but who had successfully demurred, and who were creditors for £62, the amount of their costs in the suit, put various questions to the debtor with reference to the claim in that suit. Ultimately the debtor objected to answer one of the questions put, and, on the advice of his solicitor, declined to answer any more questions, on the ground that the examination was really for the purpose of obtaining evidence to assist the Defendants in their defence of the suit. The meeting approved of the debtor's refusal to answer, and resolved that the examination should not be continued. A creditor for £2000 named *Strousberg*, who was present, told the meeting that he would for the benefit of the creditors prosecute the claims at his own risk. The creditors resolved by the proper majority, 1, that the debtor's affairs should be liquidated by arrangement; 2, that *Strousberg* should be appointed trustee without a committee of inspection; 3, that the debtor's discharge should be granted when the trustee should certify his consent thereto in writing; 4, that, having regard to the fact that the matters forming the subject of the questions of the company's solicitor were *sub judice*, the debtor was perfectly justified in declining to answer such questions. The company and the Defendants to the other suit opposed the registration of the resolutions, but the Judge of the County Court decided that they ought to be registered. The decision of the County Court Judge was reversed by *Bacon*, C.J.:—*Held*, by *James* and *Brett*, L.JJ. (*dubitante Cotton*, L.J.), reversing the decision of *Bacon*, C.J., that there was not sufficient evidence to shew that the resolutions had not been passed *bonâ fide*, and that they ought to be registered, with the exception of the third resolution, which was *ultrà vires*.—*Per Cotton*, L.J.:—It was doubtful whether the creditors, without further information as to the validity of the claims in the two suits, could have been acting *bonâ fide* in passing resolutions not merely for a liquidation by arrangement, but empowering the trustee to fix the time when the debtor should have his discharge. *Ex parte* HOPE. *In re* HOPE - - - - C. A. 398

9. —— *Proof—Felony - Theft of Money—Imputation of Attempt to compound Felony—Effect of Evidence—Admission to Proof of Sum equal to the Amount stolen.*] The bankrupt, who was a banker's clerk, having absconded on the 16th of March, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the same month the bankers received from the bankrupt a letter confessing thefts to the amount of £7852 19*s*. Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in *England*.—Conversations on the 19th, and again on the 22nd of March, between a partner of the bank and relatives of the bankrupt, were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to *America*, or elsewhere;" and on the

BANKRUPTCY—*continued.*

latter occasion, an offer having been made by the bankrupt's wife that the bankrupt should return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." It was also in evidence that after the conversation on the 19th, one of the relatives who was present had an interview with the bankrupt in this country, since which he had disappeared.—The Registrar of the County Court having refused to admit to proof a claim of the bankers for the sum of £7852 19*s.*:—*Held*, that there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen; and appeal allowed. *Ex parte* Turquand. *In re* Shepherd [704

10. —— *Undischarged Debtor—Fresh Trading—Credit obtained on Faith of Representations of Trustee—Assent of Creditors—Right of Trustee to Debtor's Property.*] *D. & C.*, who traded in partnership, filed a liquidation petition on the 4th of December, 1876. On the 19th of December the creditors resolved on a liquidation by arrangement, appointed *B.* trustee, with a committee of inspection, and resolved that the debtors' discharge should be granted upon the committee of inspection and the trustee certifying that they were entitled to it. On the 3rd of January the committee resolved that *C.* should be allowed to realize the stock-in-trade and to collect the debts due to the estate, under the supervision of the committee, for six months from that day, the committee receiving the proceeds; that, if 7*s.* 6*d.* in the pound and the costs of the liquidation were thus realized, a further 7*s.* 6*d.* in the pound should be accepted from *C.* for the remainder of the estate, if it was paid within three months; that *D.* should be allowed his discharge, subject to the payment of his private debts, and that *C.* should have his discharge on payment of the 15*s.* *C.* realized the stock-in-trade and the debts, and out of the proceeds paid £719 to the committee, and £60 to the trustee for his costs of the liquidation. The £719 was not enough to pay the first 7*s.* 6*d.*, but that was in fact paid soon after it became due to all the creditors who had proved. There were only eight of them. The debtors' bankers, to whom they owed £251 at the commencement of the liquidation, did not prove, because they were amply secured by a mortgage of real estate of *C.*, which he had executed in favour of the bank in February, 1876, to secure moneys advanced by them to him or to his firm. In February, 1877, *C.* commenced trading again alone. Seven of the old creditors dealt with him again and gave him credit. Before he recommenced business he applied to the bank to give him credit on the security of the mortgage. The bank manager had an interview with the trustee, and asked him whether the bank might safely deal with *C.* The trustee told him that the matter was quite out of his hands, and that it would be all right. The bank then agreed to give *C.* fresh credit. The second instalment of 7*s.* 6*d.* was not paid when it became due. The creditors applied for payment to *C.*, not to the trustee, but did not take any steps to enforce payment. Ultimately *C.* paid the second

BANKRUPTCY—*continued.*

instalment to one of the creditors and part of it to some of the others, making the payment in part by means of cheques on the bank. In July, 1877, the mortgaged property was sold by *C.*, with the consent of the bank, for £1180, which was paid to the bank and carried to the credit of *C.*'s account. In August, 1877, he was adjudicated a bankrupt. At the end of July, 1877, the trustee's solicitor had claimed the £1180 from the bank. After the adjudication the trustee in the liquidation applied to the County Court for an order that the bank should pay the £1180 to him. The Judge ordered the bank to pay over the balance, after deducting the debt due to them by the firm of *D. & C.* and the advances made by them to *C.* after the date of the liquidation petition:—*Held*, by *Bacon*, C.J., and by the Court of Appeal, that, having regard to the representations made by the trustee to the bank, and the conduct of the creditors, the bank were entitled to retain out of the purchase-money the advances which they had made to *C.* since the filing of the liquidation petition.—*Per Baggallay*, L.J.:—Upon the principle of *Troughton* v. *Gitley* (Amb. 630), the representations made by the trustee would of themselves have been sufficient to give the bank the right which they claimed. —*Per Bramwell*, L.J.:—The principle of *Troughton* v. *Gitley* did not apply. *Ex parte* Bolland. *In re* Dysart - - - - C. A. 312

11. —— *Practice—Bankruptcy Appeal—Security for Costs—Increasing Amount of Deposit—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *ss.* 9, 16, 18—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Rules*, 1870, *r.* 145.] Notwithstanding rule 145 of the Bankruptcy Rules, 1870, the Court of Appeal can, under Order LVIII., rule 15, of the Rules of Court, 1875, require such security as it thinks fit to be given for the costs of a bankruptcy appeal.—Order made to increase the amount of the deposit on a bankruptcy appeal from £20 to £70, on the ground of the insolvency of the Appellant. *Ex parte* Isaacs. *In re* Baum [C. A. 271

12. —— *Practice—Appeal—Time for appealing—Twenty-one Days from the Date of the Order—Bankruptcy Rules*, 1870, *r.* 143—*Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15.] In construing the 143rd of the Bankruptcy Rules, 1870, the words "decision" and "order" mean the same thing; and the twenty-one days within which an appeal from a County Court to the Chief Judge must be brought are to be reckoned from the date of the settling and signing of the order.—The decision in *Ex parte Garrard* (5 Ch. D. 61) does not apply to the case of an appeal from a County Court to the Chief Judge in Bankruptcy.—*Ex parte Hinton* (Law Rep. 19 Eq. 266) explained. *Ex parte* Cochrane. *In re* Sendall - - - 698

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BILLS OF SALE ACT—*Registration—Agreement for Hire and conditional Sale of Furniture—License to seize—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] *R.*, on the 29th of November, 1877, entered into an agreement with *C. & Co* to hire some furniture from them, which was admitted to be of the value of £63. *R.* was to pay *C. & Co.* £10 on the signing of the agreement, £5 on the 4th of January then next, and £5 on the 4th of each succeeding month during the continuance of the agreement, and he was also on the signing of the agreement to deposit with *C. & Co.* promissory notes for the total amount of the instalments as collateral security, and without prejudice to their title to the furniture and to their rights under the agreement. In case of the furniture being seized by them under the agreement, the notes, or so many of them as should then be current, were to become void. In the event of non-payment of any of the notes when due *C. & Co.* might seize, remove, and retake possession of the furniture as in their first and former estate, notwithstanding any payments made by *R.*, which payments were then to be forfeited to *C. & Co.* Upon payment by *R.* to *C. & Co.* of the full amount of £66 by the above instalments the furniture was to become his property, but, until the whole of that sum had been paid, the furniture was to remain the sole property of *C. & Co.*, and was only let on hire to *R.*—The furniture was delivered to *R.* and he gave the promissory notes. On the 9th of January, 1878, he filed a liquidation petition, under which a trustee was appointed, who took possession of the furniture, which was then in *R.*'s house. On the 19th of March, some of the monthly instalments being overdue, *C. & Co.* seized the furniture:—*Held* (reversing the decision of the Registrar), that the property in the furniture did not pass to *R.* until payment of the full amount of the instalments, and that consequently the agreement did not amount to a bill of sale by *R.*, and did not require registration.—*Ex parte* Crawcour. *In re* Robertson - C. A. 419

2. —— *Registration — Mortgage by Joint Tenants—Subsequent Assignment by one of them of his Interest to the other — Bankruptcy of Assignee—Fixtures—Reputed Ownership—Order and Disposition—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7—*Bankruptcy Act*, 1869 (32 & 33 *Vict c.* 71), *s.* 15.] On the 29th of April, 1876, two partners in trade executed a mortgage of their trade fixtures and loose chattels. The mortgage was not registered as a bill of sale. On the 7th of June, 1876, the partnership was dissolved, and the business was thenceforth carried on by one of the two partners alone. On the 29th of January, 1877, the outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mortgage. On the 22nd of March, 1878, the continuing partner filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mortgagee had not demanded possession of the loose chattels, but there was no evidence of any actual consent on his part to the change of possession:—*Held*, that the loose chattels passed by virtue of the reputed ownership clause to the trustee in the liquidation.—But *held*, that, as regarded the trade fixtures, the mortgage was, by reason of non-registration, void as against the trustee only to the extent of the liquidating debtor's original moiety.—When there is a mortgage of leasehold property and fixtures with a power of sale, the *Bills of Sale Act* applies not only where the power of sale authorizes the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures.—*Ex parte Barclay* (Law Rep. 9 Ch. 576) explained. *Ex parte* Brown. *In re* Reed. - C. A. 389

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BUILDING SOCIETY — *Mortgage — Account — Fines—Interest.*] Fines secured by covenant in a mortgage to a building society form part of the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest.—The form of foreclosure decree in the case of a mortgage to a building society does not differ from that in the case of an ordinary mortgage. Provident Permanent Building Society *v.* Greenhill 122

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—— *Ashton* v. *Lord Langdale* (4 De G. & Sm. 402) overruled - - - 337
See Charity. 1.
—— *Barclay, Ex parte* (Law Rep. 9 Ch. 576), explained - - - - 389
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—— *Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) considered - - - - 198
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—— *Brighton Arcade Company* v. *Dowling* (Law Rep. 3 C. P. 175) disapproved - 595
See Company. 8.
—— *Burton* v. *Newbery* (1 Ch. D. 234) considered - - - - 231
See Will. 13.

CASES—*continued.*

—— *Carter* v. *Bentall* (2 Beav. 551) considered *See* WILL. 7. [131

—— *Chandler* v. *Howell* (4 Ch. D. 651) overruled - - - - - 337
See CHARITY. 1.

—— *Chapman* v. *Brown* (6 Ves. 404) considered *See* CHARITY. 2. [576

—— *Cherry* v. *Boultbee* (4 My. & Cr. 442) followed - - - - 673
See SET-OFF.

—— *Christie* v. *Ovington* (1 Ch. D. 279) considered - - - - 582
See TRUSTEE. 1.

—— *Cooper* v. *Cooper* (2 Ch. D. 492) explained *See* PRACTICE. 16. [46

—— *Crosbie* v. *MacDowal* (4 Ves. 610) considered *See* WILL. 13. [231

—— *De Beauvoir* v. *De Beauvoir* (3 H. L. C. 524) distinguished - - - 658
See WILL. 4.

—— *Dickin, Ex parte* (8 Ch. D. 377), distinguished - - - - 381
See BANKRUPTCY. 4.

—— *Dundee, Magistrates of,* v. *Morris* (3 Macq. 134) considered - - - 576
See CHARITY. 2.

—— *Fisk* v. *Attorney-General* (Law Rep. 4 Eq. 521) considered - - - 576
See CHARITY. 2.

—— *Garrard, Ex parte* (5 Ch. D. 61), distinguished - - - - 698
See BANKRUPTCY. 12.

—— *Hall, In re* (10 W. R. 37), considered 80
See TRUSTEE RELIEF ACT. 2.

—— *Haselfoot's Estate, In re* (Law Rep. 13 Eq. 327), not followed - - - 568
See MORTGAGE. 2.

—— *Hinton, Ex parte* (Law Rep. 19 Eq. 266), explained - - - - 698
See BANKRUPTCY. 12.

—— *Mercier* v. *Cotton* (1 Q. B. D. 442) distinguished - - - - 616
See PRACTICE. 7.

—— *National Bank, Ex parte* (Law Rep. 14 Eq. 507), not followed - - - 568
See MORTGAGE. 3.

—— *Pearce* v. *Lindsay* (1 D. F. & J. 573) explained - - - - 239
See PRACTICE. 5.

—— *Royle, Ex parte* (26 W. R. 216), explained *See* BANKRUPTCY. 6. [701

—— *Sinclair* v. *Jackson* (3 K. & J. 198) considered - - - - 143
See LIMITATIONS, STATUTE OF.

—— *Spalding* v. *Thompson* (26 Beav. 637) not followed - - - - 568
See MORTGAGE. 2.

—— *Street, In re* (10 Eq. 165), considered 538
See SOLICITOR. 2.

—— *Troughton* v. *Gitley* (Amb. 630) considered *See* BANKRUPTCY. 10. [312

—— *United Kingdom Assurance Company, In re* (34 Beav. 493), considered - 80
See TRUSTEE RELIEF ACT. 2.

CASES—*continued.*

—— *Vincent* v. *Going* (1 J. & Lat. 697) considered - - - - - 143
See LIMITATIONS, STATUTE OF.

—— *Webb's Policy, In re* (Law Rep. 2 Eq. 456), considered - - - - 80
See TRUSTEE RELIEF ACT. 2.

—— *Wheeler* v. *Howell* (17 Beav. 405) considered - - - - - 143
See LIMITATIONS, STATUTE OF.

—— *White* v. *Simmons* (Law Rep. 6 Ch. 555) considered - - - - 381
See BANKRUPTCY. 4.

—— *Wyth* v. *Blackman* (1 Ves. Sen. 197) considered - - - - 131
See WILL. 7.

CAVEAT EMPTOR—Mistake in lease - 103
See LANDLORD AND TENANT.

CERTIFICATE—Committee of inspection—Liquidation - - - - 701
See BANKRUPTCY. 6.

CHAMBERS—Motion to discharge order—Appeal *See* PRACTICE. 1. [243

CHARGE OF DEBTS—Locke King's Act - 12
See ADMINISTRATION. 2.

CHARITY—*Charitable Uses*—9 *Geo.* 2. *c.* 36—*Debenture Stock—Interest in Land.*] *Held*, by the Court of Appeal, reversing the decision of *Hall*, V.C., that debenture stock created under the provisions of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), Part III., does not give the holder an interest in land within the meaning of 9 Geo. 2, c. 36, and may therefore be given by will for charitable purposes.—And *semble*, the same rule applies to debentures as to debenture stock.—*Ashton* v. *Lord Langdale* (4 De G. & Sm. 402) and *Chandler* v. *Howell* (4 Ch. D. 651) overruled. ATTREE *v.* HAWE - - C. A. 337

2. —— *Will — Charitable Bequest — Object partly illegal — Repair of Tomb — Whole Fund given to valid Charity—Costs—Executor.*] Bequest to the incumbent for the time being of *U.* of £500, the income to be applied, when necessary, in keeping in repair the grave and the railing and tombstone of *A.*, and the remainder of such income to be applied in providing wine and bread for the sick poor of *U.*, with a gift of the residue to the executor in trust for *B.* The executor paid the legacy into Court under the *Trustee Relief Act.* On petition by the incumbent:—*Held*, that the first purpose of the gift being invalid, the whole of the income was applicable to the charity; and that the sum should be paid to the official charity trustee to invest and pay the income to the incumbent of *U.* for the time being to be applied by him for the sick poor of the parish, as in the will directed: the executor's costs not to be allowed out of the fund, though he might take it out of the residue. —The cases of *Chapman* v. *Brown* (6 Ves. 404), *Magistrates of Dundee* v. *Morris* (3 Macq. 134), and *Fisk* v. *Attorney-General* (Law Rep. 4 Eq. 521), commented on. *In re* BIRKETT - 576

CLASS—Gift to - - - - 117, 607
See WILL. 6, 10.

COAL—Expense of winning - - - 685
See MINE.

CODICIL - - - - - - 231
See Will. 13.

COMMISSION - - - - - - 529
See Principal and Agent.

COMMITTEE OF INSPECTION—Liquidation 701
See Bankruptcy, 6.

COMPANY—*Director, Exclusion of—Injunction—Qualification—Trust Shares—Shares held "in his own right."* A director of a company can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as director.—Where the articles of association of a company provided that no person should be eligible as a director unless he held "as registered member in his own right capital of the nominal value of £500 at least":—*Held*, that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, though he had transferred his shares to another, was properly eligible. Pulbrook *v.* Richmond Consolidated Mining Company - - - - - - 610

2. —— *Registration—Identity of Names—Injunction—Intention to deceive—Companies Act*, 1862, *s.* 20.] There is nothing in the *Companies Act*, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of sect. 20 against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies. Merchant Banking Company of London *v.* Merchants' Joint Stock Bank - 560

3. —— *Voluntary Society—Sale of Society's Property—Right of Members to dispose of Proceeds of Sale.*] Upon the sale of land belonging to a company of the nature of a voluntary society, with no rules or provisions as to the disposition of its property:—*Held*, that the members of the company for the time being were entitled to divide the proceeds in equal shares. Brown *v.* Dale - - - - - - 78

4. —— *Winding-up—Contributory—Director—Entry of Name on Register.*] Where no share qualification is necessary, the mere fact of acting as a director of the company, and of attendance at meetings in that character, is not enough to fix a man with knowledge that his name has been entered on the share register, and with consequent liability, if he neither applied for shares nor received any notice of allotment.—There is no presumption of law that a director knows the contents of the books of the company.—The decision of *Bacon*, V.C., affirmed. *In re* Wincham Shipbuilding, Boiler, and Salt Company. Hallmark's Case - - - C. A. 329

5. —— *Winding-up—Contributory—Companies Act*, 1862, *s.* 164—*Fraudulent Preference.*] Three directors, who had not paid or been called upon to pay anything on their shares, made themselves liable on their personal guarantee for money advanced to the company by a bank. The company being in difficulties, and the bank having recovered judgment against the guarantors, a resolution was passed by the board of directors that in order to reduce the debt due to the bank the directors be recommended to pay in advance the amount of their shares. The three directors subsequently paid a sum equal to the amount of their shares, which was carried to the credit of the company at the bank. Two days afterwards a petition was presented on which an order for winding up was made:—*Held* (reversing the decision of *Bacon*, V.C.), that the three directors were guilty of no breach of trust or duty to the company in paying up their shares in order to relieve themselves of their personal liability to the bank; that the payment was a valid payment on account of the shares; and that the shares must be treated as paid-up shares. *In re* Wincham Shipbuilding, Boiler, and Salt Company. Poole, Jackson, and Whyte's Case C. A. 322

6. —— *Winding-up—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 21—*Primâ facie Case—Security for Costs—Demurrer to Petition—Creditors for less than £50—Policyholders—Allegation of Insolvency—Secretary appointed Liquidator—Practice as to opening Demurrer.*] A petition was presented by two policyholders to wind up compulsorily an insurance company which was being wound up voluntarily, containing charges of false representations and insolvency:—*Held*, upon a preliminary objection, that where a company was being wound up voluntarily it was unnecessary to consider whether a *primâ facie* case was stated, nor to order security for costs under the *Assurance Companies Act*, 1870:—*Held*, upon demurrer to the petition, that policy-holders might present a petition under the Act of 1870, although their debts did not amount to £50; that a statement—that under the circumstances the company was "admittedly insolvent"—was a sufficient statement that they could not pay their debts; and that the allegations of false representations, and the appointment of the secretary as provisional liquidator, were sufficient to render it just and equitable to make a winding-up order:—*Held*, also, that upon demurrer to a petition, the counsel for the Petitioner must open his case. *In re* British Alliance Assurance Corporation - - - - - 635

7. —— *Winding-up—Voluntary Winding-up under Supervision — Proof — Property Tax — Priority of the Crown.*] Where a company is being wound up under the provisions of the *Companies Act*, 1862, the Crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding-up, in priority to the other creditors.—The decision of *Malins*, V.C., reversed. *In re* Henley & Co. - - - - C. A. 469

8. —— *Winding-up—Voluntary Winding-up—Contributory—Debt due from Company—Right of Set-off against Calls—Companies Act*, 1862, *ss.* 38, 101, 138.] Where a limited company is in voluntary liquidation, a contributory cannot set off a debt due to him from the company against calls made against him either by the company before or by the liquidator after the resolution to

COMPANY—*continued.*
wind up.—*Brighton Arcade Company* v. *Dowling* (Law Rep. 3 C. P. 175) disapproved of. *In re* Whitehouse & Co. - - - - 595

9. —— *Winding-up — Witness — Registration of Shares—Repudiation of Ownership—Contributory—Assignment to Company of Right to be indemnified—Action by Liquidator in the Name of Assignor—Application to examine Defendant—Companies Act*, 1862, *s.* 115—*Costs.*] *M.*, at the request of *A.*, who afterwards repudiated the ownership in them, and alleged that it was in *H.*, agreed that shares in a company, subsequently ordered to be wound up, might be registered in his name as trustee. The shares were afterwards transferred to *W.*, and in the liquidation *M.* was placed in the B list of contributories, and was required to pay the call made. *M.* in 1876 assigned to the company all right to be indemnified by *A.* and *H.*, and under the power in the deed to sue in his name the liquidator, with the sanction of the Court, brought an action in *M.'s* name against *A.* and *H.*, to recover what was due on the shares, and for a declaration that they or one of them were or was bound to indemnify *M.* against all liability. Issue was joined in November, 1877. On an application by the liquidator under the 115th section of the *Companies Act*, 1862:—*Held*, that *A.* was a person liable to be summoned, as being capable of giving information in reference to the assets of the company, and that he must attend before the special examiner to be examined and answer all relevant questions. Massey *v.* Allen - - - - 164

—— Vendor's lien against railway company 385
See Railway. 2.

COMPENSATION—Mistake in lease - 103
See Landlord and Tenant.

COMPOUNDING FELONY—Proof in bankruptcy for amount stolen - - - 704
See Bankruptcy. 9.

COMPROMISE—Setting aside—Interlocutory application - - - - 259
See Practice. 8.

CONFIRMATION—Will - - - 231
See Will. 13.

CONSOLIDATION OF ACTIONS - - 459
See Practice. 2.

CONSUMABLE ARTICLES—Bequest of - 95
See Will. 1.

CONTRACT—Specific performance with variation [223
See Specific Performance.

CONTRIBUTORY - - 164, 322, 329, 595
See Company. 4, 5, 8, 9.

CORPUS—Payment out of—Annuity - 151
See Will. 3.

COSTS - - - - 239, 250, 483, 618
See Practice. 3, 4, 5, 17.

—— Security for—Bankruptcy appeal - 271
See Bankruptcy. 11.

—— Security for—Winding-up petition - 635
See Company. 6.

—— Trustee Relief Act - - 80, 576
See Trustee Relief Act. 2, 3.

COUNSEL—Costs of three counsel - - 239
See Practice. 5.

COUNTY COURT—Jurisdiction of—Absconding debtor - - - - 333
See Bankruptcy. 2.

COURT ROLLS—Inspection of - - 29
See Practice. 13.

COVENANT — *Restrictive Covenant — Covenant running with Land—Assign of Covenantee—Right to sue.*] The former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the Defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land.—The same vendors afterwards sold the residential estate to the Plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the Plaintiffs' conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned.—In an action by the Plaintiffs, to restrain the Defendants, who had purchased the land first sold as above mentioned with notice of the first-mentioned restrictive covenants, from building in contravention of those covenants:—*Held*, that, although the Plaintiffs were "assigns" of the original covenantees, they were not entitled to sue upon the original covenants. Renals *v.* Cowlishaw - - - - - - 125

—— To settle after-acquired property - 5
See Settlement.

CROWN DEBT—Property tax—Priority - 469
See Company. 7.

CUSTOM—Of trade—Trade-mark - - 487
See Trade-mark.

DAMAGE—Apportionment—Act of God—Negligence - - - - 503
See Negligence.

DEATH WITHOUT ISSUE—Estate in fee simple [646
See Deed.

DEBENTURE STOCK—Mortmain - - 337
See Charity. 1.

DEBTOR'S SUMMONS - - - 333
See Bankruptcy. 2.

DECLARATION OF INTENTION - - 441
See Domicil.

DECLARATION OF TRUST—Imperfect assignment - - - - - 113
See Voluntary Settlement.

DEED—*Estate in Fee Simple—Limitation over on Death "without leaving Issue."*] By settlement made in 1817 freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of *A.*, deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of *A.*, their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children of *A.* should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying unto and equally between persons named.—*A.* had two

DEED—*continued.*
children, one of whom, *B.*, died intestate and unmarried, the other, *C.*, intestate as to his share, but leaving a daughter, *D.*:—*Held*, that the interest taken by *D.* under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue. Olivant *v.* Wright - - - - 646

DEEDS—Possession of - - - 189
See Solicitor. 1.

DELAY—*Lapse of Time—Injunction in Aid of Legal Right—Action of Deceit—Statute of Limitations.*] When an injunction is sought in aid of a legal right, the Court is bound to grant it if the legal right is established.—Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right.—To an action for an injunction to restrain the Defendant from representing that the business carried on by him was the same as that carried on by the Plaintiff, it was objected that the Plaintiff had known for between two and three years before issuing his writ the facts on which he relied:—*Held*, that this delay was no bar to the action. Fullwood *v.* Fullwood - - 176

DEMURRER - - - - - - 34
See Practice. 6.

DIRECTOR - - - 322, 329, 610
See Company. 1, 4, 5.

DISCHARGE—Bankruptcy—Discretion of Judge
See Bankruptcy. 3. [694

—— Liquidating debtor - - 398, 701
See Bankruptcy. 6, 8.

DISCOVERY - - - - - 616
See Practice. 7.

DISCRETION OF JUDGE—Bankruptcy—Order for discharge - - - 694
See Bankruptcy. 3.

DISSENTIENT BONDHOLDER—Party to suit
See Practice. 11. [552

DOMICIL — *Change of Original Domicil — Permanence of Residence—Declarations of Intention.*] The testator in the suit was a Frenchman, but had lived twenty-seven years in *England*, during the greater part of which time he was a partner in an English house of business, paying occasional visits to *France*. He married successively, in English churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in *England* as Protestants. He made his will in the English form, and left his property in a manner inconsistent with French law. Upon an action to establish a French domicil, numerous witnesses deposed that he had made various parol declarations that he intended to return to *France* when he made his fortune. It was also proved that he always refused to be naturalized in *England*, and would not take a lease of more than three years of his house:—*Held* (affirming the decision of *Malins*, V.C.), that the acts of the testator manifested an intention to acquire an English domicil; and that his declarations of intention to return to *France* when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages. Doucet *v.* Geoghegan - C. A. 441

DOMICIL—*continued.*
—— Scotch testator—English administration 173
See Administration. 1.

DOUBLE PORTIONS—Will—Satisfaction - 363
See Will. 11.

ESTATE—Fee simple—Limitation over on death without issue—Deed - - 646
See Deed.

EVIDENCE—Information and belief—Interlocutory application - - - 259
See Practice. 8.

EXAMINATION—Debtor—Bankruptcy - 398
See Bankruptcy. 8.

—— Winding-up—Summons by liquidator 164
See Company. 9.

EXCESSIVE APPOINTMENT - - 652
See Power.

EXCLUSION OF DIRECTOR - - 610
See Company. 1.

EXECUTOR—Payment into Court under Trustee Relief Act—Costs - - - 576
See Trustee Relief Act. 3.

—— Retainer—Mortgagee—Executor of mortgagor - - - - 568
See Mortgage. 2.

—— Retainer—Set-off - - - 673
See Set-off.

EXPORTING AGENT—Trade-mark - 487
See Trade-mark.

FELONY—Compounding — Proof in bankruptcy for amount stolen - - - 704
See Bankruptcy. 9.

FINES—Building society - - - 122
See Building Society.

FIXTURES—Bills of Sale Act - - 389
See Bills of Sale Act. 2.

FORECLOSURE—Action by trustee in bankruptcy - - - - 212
See Mortgage. 1.

—— Judgment set aside - - - 594
See Mortgage. 3.

—— Jurisdiction of bankruptcy - - 381
See Bankruptcy. 4.

—— Mortgage to building society - - 122
See Building Society.

FOREIGN SOVEREIGN—Submission to Court
See Jurisdiction. [351

FRAUDULENT PREFERENCE — Winding-up—Debt due to directors - - 322
See Company. 5.

GAVELKIND—Devise to right heirs - 213
See Will. 9.

HEIR-AT-LAW—Gift of blended fund - 658
See Will. 4.

—— Mortgagor—Heirship not proved - 594
See Mortgage. 3.

HOTCHPOT—Advancement—Letters writing off amounts - - - - 170
See Will. 8.

HOUSE—Lands Clauses Act - - 425
See Lands Clauses Act.
HUSBAND AND WIFE—Marriage settlement 5
See Settlement.

ILLEGALITY—Gift to charity partly illegal 576
See Charity. 2.
IMITATION—Name of company—Registration
See Company. 2. [560
INCOME—Payment out of—Annuity - 151
See Will. 3.
INCOME TAX—Priority—Winding-up - 469
See Company. 7.
INJUNCTION—Against arbitrator - - 89
See Practice. 9.
—— Company trading under identical name 560
See Company. 2.
—— Delay - - - - - 176
See Delay.
—— Property of foreign sovereign - - 351
See Jurisdiction.
—— Threatened infringement of patent - 48
See Patent.
—— Vendor's lien against railway company 385
See Railway. 2.
INSOLVENCY—Allegations of—Winding-up petition - - - - - 635
See Company. 6.
INSPECTION OF DOCUMENTS - - 29
See Practice. 13.

INSURANCE—*Equitable Mortgage—Assignment—Notice—Priority—Constructive Notice—Policies of Assurance Act*, 1867 (30 & 31 *Vict. c.* 144).] An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the *Policies of Assurance Act*, 1867.—Accordingly, notice to the *Assurance Company* of such an agreement does not give under that Act any priority over a prior equitable mortgagee who has given no notice but has possession of the policy.—The holder of a policy of assurance on his own life deposited it with *A.* by way of equitable mortgage to secure a loan. *A.* retained the policy, but gave no notice to the company.—*B.* afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy-holder upon a deposit of the same policy, and the policy-holder, alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to *B.*, took the loan and signed a memorandum that he had deposited the policy with *B.*, and that he undertook on request to execute to *B.* an effectual mortgage of it.—*B.* gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy-holder for the policy, but the policy-holder made various excuses for not handing it over, and died leaving it in the possession of *A.*:—*Held*, that the circumstances of the case were such as to put *B.* on inquiry at the time of the loan, and to fix him with constructive notice of *A.'s* security, and that the title of *A.*, as in possession of the policy, must prevail over that of *B.*, although *B.* did and *A.* did not give notice to the company. Spencer *v.* Clarke [137

INSURANCE—*continued.*
—— Life—Payment of money into Court 80
See Trustee Relief Act. 2.
INTENTION — Contrary — Will speaking from death - - - - - 667
See Will. 12.
—— Evidence of—Double portions - - 363
See Will. 11.
INTEREST—Money charged on land—Statute of Limitations - - - - - 143
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INTERLOCUTORY APPLICATION—To set aside compromise - - - - 259
See Practice. 8.
INTERROGATORIES - - - 616, 643
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INVESTMENT—Funds sanctioned by the Court
See Trustee. 3. [112
ISSUE—Restricted to children - - 131
See Will. 7.

JUDGMENT CREDITOR—Right to receiver 275
See Practice. 14.

JURISDICTION—*Foreign Sovereign—Submission—Injunction—Property—Patent.*] The Court has no jurisdiction to prevent a foreign sovereign from removing his property in this country.—A foreign sovereign who, for the purpose of obtaining his property, submits to be made a Defendant in an action, does not thereby lose his rights.—There is a right of property in an article made in infringement of a patent although the Court would order the article to be destroyed.—A foreign sovereign bought in *Germany* shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a Defendant to the suit An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells. Vavasseur *v.* Krupp - C. A. 351
—— Bankruptcy - - - 252, 381
See Bankruptcy. 4, 5.
—— County Court—Absconding debtor - 333
See Bankruptcy. 2.
—— Decree for administration—Scotch assets
See Administration. 1. [173
—— Injunction against arbitrator - - 89
See Practice. 9.

LANDLORD AND TENANT—*Error in Terms of Lease—Claim for Compensation—Rule of Caveat Emptor.*] By a contract in 1861, *A.* agreed to grant an underlease to *B.* of certain premises for the residue of the term held by *A.*, except the last ten days, such underlease to contain similar clauses and covenants to those contained in the original lease. In pursuance of this contract an underlease was prepared by the lessor's solicitor for twenty-three years less ten days, and the lease

LANDLORD AND TENANT—*continued.*
was executed by the lessee, who neither inspected the original lease nor employed any professional adviser. In 1877 it was discovered that the original lease had only sixteen years to run, and the underlease had, by mistake, been made for seven years longer than the lessor had power to grant. The lessee claimed compensation:—*Held*, that the lessee was to blame in not inspecting the original lease and ascertaining for himself the precise term, and that *caveat emptor* applied. BESLEY *v.* BESLEY [103

LANDS CLAUSES ACT, *s.* 92—*Part of House—Part of Manufactory.*] The Plaintiff was the owner of a leasehold house in *H. Street*, and of five freehold cottages in *B. Row*, which ran parallel to *H. Street*, the yards at the back of the cottages abutting on the back yard and buildings held with the house in *H. Street*. The Plaintiff used the house in *H. Street* as a dwelling-house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in *B. Row* was turned into a store-house, and was made to communicate with the *H. Street* premises, and was used as a back entrance to them.—A tramway company gave notice to treat for the five cottages in *B. Row* and the yards behind them. The Plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his "manufactory buildings and land" which was comprised in the notice to treat; and for an injunction:—*Held*, by *Hall*, V.C., that the whole block of buildings constituted one "manufactory" within the meaning of the 92nd section of the *Lands Clauses Act*, and that the company was bound to take the whole.—*Held*, by the Court of Appeal (affirming the decision of *Hall*, V.C.), that the whole block constituted one "house" within the meaning of the section:—*Held*, by *Brett*, L.J., that the whole block also constituted one "manufactory."—The words "house or other building or manufactory" in the 92nd section of the *Lands Clauses Act* refer to three distinct things; and it is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a "house," or a "building," or a "manufactory." RICHARDS *v.* SWANSEA IMPROVEMENT AND TRAMWAYS COMPANY - - - C. A. 425

LEASE—Mistake in—Compensation - 103
See LANDLORD AND TENANT.

LEASEHOLDS—Bankruptcy—Liability of trustee for rent - - - - 252
See BANKRUPTCY. 5.

LIEN—Vendor—Railway company - 385
See RAILWAY. 2.

LICENSE—Coal mine - - - 685
See MINE.

LIFE INSURANCE - - - - 137
See INSURANCE.

LIFE INSURANCE COMPANY—Winding-up
See COMPANY. 6. [635

LIMITATIONS, STATUTE OF—*Investment upon Mortgage of Land—Bequest of Residue of Personalty for Life and in Remainder—Mortgage of Reversionary Interest—3 & 4 Will. 4, c. 27, s. 42—Interest.*] *A.* was legatee in reversion after certain life-interests of a testatrix's residuary personal estate. The estate consisted wholly or chiefly of a sum of £3000 invested on mortgage of real estate by the testatrix and continued on such investment by her trustees. *A.* mortgaged his interest in the £3000, and after sixteen years (during which *A.* paid no interest on his mortgage) *A.'s* reversion fell into possession:—*Held*, that *A.'s* mortgagee was entitled as against the residuary estate to recover the whole arrears of interest, the mortgage by *A.* not being a charge on real estate within the meaning of sect. 42 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).—*Semble*, however, that if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of sect. 42 in barring arrears of interest beyond six years.—*Vincent* v. *Going* (1 J. & Lat. 697, 701), *Sinclair* v. *Jackson* (3 K. & J. 198, 201), and *Wheeler* v. *Howell* (17 Beav. 405, 410), discussed. SMITH *v.* HILL - - - - 143

LINE OF BUILDING - - - 677
See PUBLIC HEALTH ACT, 1875.

LIQUIDATION - - - 398, 466, 701
See BANKRUPTCY. 6, 7, 8.

LOCAL GOVERNMENT BOARD - - 677
See PUBLIC HEALTH ACT, 1875.

LOCKE KING'S ACT - - - - 12
See ADMINISTRATION. 2.

MANUFACTORY—Lands Clauses Act - 425
See LANDS CLAUSES ACT.

MARRIED WOMAN—Assent to breach of trust
See HUSBAND AND WIFE. [587

METROPOLITAN BUILDING ACT (18 & 19 *Vict. c.* 122), *s.* 83, *sub-ss.* 7, 11; *s.* 85, *sub-s.* 7—*Party-wall—Action by Co-owner — Undermining by adjoining Owner—Surveyor.*] Although a co-owner of a party-wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall and replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet, when within the area of the *Metropolitan Building Act* (18 & 19 Vict. c. 122), such a work being a right in relation to a "party structure" within the meaning of sect. 83, sub-sects. 7, 11, cannot be carried out when a difference arises between the building owner and the adjoining owner (unless they concur in the appointment of one surveyor) except by the award of two surveyors and a third selected by them, or of any two of such surveyors, as provided by sect. 85, sub-sect. 7, of the Act. STANDARD BANK OF BRITISH SOUTH AMERICA *v.* STOKES - - - - - - 68

MINE—*Winning—Working—Expenses—Profits—Allowances—Bad Debts.*] By a deed of grant and license the licensee was empowered to work and win the coal mines under certain lands, and,

MINE—*continued.*]
out of the profits to arise by the sale of the coals, to reimburse himself all expenses of the winning thereof; and after full payment of such expenses of winning the coal mines the licensee was to pay the licensor a sum of money in respect of the coals raised as therein mentioned.—The licensee reached the coal mines by a driftway from an adjoining colliery, and worked the coal:—*Held*, that the coal was won, according to the meaning of the deed, on the day when it could be worked through the driftway, and that no expenses subsequently incurred could be included in the expenses of winning:—*Held*, that the expense of the driftway was to be paid out of the profits, though it had been used for the purposes of the adjoining colliery:—*Held*, that in estimating the profits out of which the expenses of winning were to be reimbursed, all the expenses of working and selling the coal, including bad debts, must be allowed. Lord Rokeby *v.* Elliot - 685

MISDESCRIPTION — Petitioner — Petition for liquidation - - - 466
See Bankruptcy. 7.

—— Will - - - - - 213
See Will. 9.

MISREPRESENTATION—When it avoids the contract - - - - 223
See Specific Performance.

MISTAKE—Lease—Compensation - - 103
See Landlord and Tenant.

—— Partnership accounts — Liberty to surcharge and falsify - - - 587
See Partnership. 1.

MORTGAGE—*Bankruptcy — Foreclosure — Jurisdiction.*] The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the Court of Bankruptcy. Waddell *v.* Toleman - 212

2. —— *Executor—Simple Contract Debt—Retainer—Preference—Rights of Specialty Creditors.*] Where a mortgagor dies insolvent, and the mortgagee then realizes his security, and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor, and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate; the mortgagee being merely in the position of a trustee of the surplus for the estate.—And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member.—*A.*, having mortgaged certain life policies to *B. & C.*, a firm of solicitors, to secure a bill of costs, died insolvent. *B. & C.* then received the policy moneys, and, after paying themselves their mortgage debt thereout, had a surplus remaining in their hands. *A.'s* widow and executrix then filed a bill against *B. & C.* for accounts and payment of the surplus, and a decree was made

MORTGAGE—*continued.*
directing the usual mortgagor and mortgagee accounts against *B. & C.*, under which a balance was found due from them as mortgagees. After the decree *A.'s* executrix died, having appointed *B.* her executor, and the action was revived against *B. & C.* by substituting a judgment creditor of *A.* as Plaintiff:—A summons by *B. & C.* to be allowed to retain the balance in payment of a simple contract debt due to them from *A.* was refused, with costs.—The principle of retainer or preference in the case of a mortgagee or executor discussed.—*Spalding* v. *Thompson* (26 Beav. 637), *In re Haselfoot's Estate* (Law Rep. 13 Eq. 327), and *Ex parte National Bank* (Law Rep. 14 Eq. 507), not followed. Talbot *v.* Frere - 568

3. —— *Foreclosure Action—Judgment for Sale against alleged Heir-at-Law of Intestate Mortgagor—Heirship not proved—Order to set aside Judgment.*] In a foreclosure action, where judgment had been obtained against the Defendant, the alleged eldest son and heir-at-law of the mortgagor who had died intestate and a contract for sale had been entered into subject to the sanction of the Judge in Chambers, it having been found that there was no evidence of the Defendant's heirship, on motion by the Plaintiffs it was ordered that the judgment be set aside, and the action dismissed without costs. Lancaster Banking Company *v.* Cooper - - - - 594

—— Building society - - - 122
See Building Society.

—— Policy of insurance - - - 137
See Insurance.

—— Reversionary interest under will—Interest
See Limitations, Statute of. [143

—— Solicitor—Notice—Priority - - 189
See Solicitor. 1.

—— Will—Locke King's Act - - 12
See Administration. 2.

MORTMAIN - - - - 337, 576
See Charity. 1, 2.

NAME OF COMPANY—Registration—Identity of name - - - - 560
See Company. 2.

NEGLIGENCE—*Damage—Injunction—Act of God—Extraordinary Flood—Overflow of Water from Dock—Company—Statutory Powers—Failure to fulfil Statutory Obligation — Apportionment of Damage.*] In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God.—Where a Defendant charged with negligence has been guilty of a breach of duty sufficient to produce the damage complained of, he cannot escape liability by shewing that the same damage would have arisen from some other cause beyond his control if he had done his duty. But if he can shew that some of the damage which actually happened arose from a cause beyond his

NEGLIGENCE—*continued.*

control, the liability for damage will be apportioned.—A dock company were authorized by their special Act to make and maintain a dock and works connected therewith according to the levels defined in certain plans and sections deposited with the clerk of the peace. The dock communicated with the River *Thames* by an artificial channel, through which the water was admitted. The sections shewed the retaining bank of the dock and channel at an uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide took place, and the river rose to 4 ft. 5 in. above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above 3 ft. 4 in., and the water had never overflowed from the dock:—*Held*, first, on the construction of the Act, that the company were bound to keep their bank up to the level of four feet above Trinity high-water mark, and were liable to the Plaintiffs for breach of their statutory duty in not doing so:—Secondly, that, independently of the Act, the Defendants were bound as riparian owners to keep the bank up to the level of 4 ft. 2 in., the height of the rest of the river wall, and that they were liable to the Plaintiffs for negligence in not doing so:—Thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the Defendants from their liability; but that they ought to have an opportunity of shewing that the damage done by the act of God and the damage done through their negligence ought to be apportioned.—The decision of *Fry*, J., affirmed with a variation. Nitro-Phosphate and Odam's Chemical Manure Company *v.* London and St. Katharine Docks Company - C. A. 503

—— Solicitor—Non-appearance at trial - 1
See Practice. 18.

NEXT OF KIN—Gift of blended fund - 658
See Will. 4.

NON-APPEARANCE AT TRIAL—Setting aside judgment - - - - 1
See Practice. 18.

NOTICE—Mortgage of policy of insurance 137
See Insurance.

—— Sale by stockbroker—Right to purchase-money - - - - 198
See Stockbroker.

—— Solicitor and client - - - 189
See Solicitor. 1.

NOVELTY—Patent - - - - 48
See Patent.

ORDER AND DISPOSITION—Unregistered bill of sale - - - - - 389
See Bills of Sale Act. 2.

ORIGIN—Domicil of - - - - 441
See Domicil.

OVERCHARGE—Agent—Commission - 529
See Principal and Agent.

PAROL EVIDENCE—Double portions—Intention
See Will. 11. [363

PAROL VARIATION—Partnership - 98
See Partnership. 2.

PART OF HOUSE—Part of manufactory—Lands Clauses Act - - - - 425
See Lands Clauses Act.

PARTIES - - - - 294, 552
See Practice. 11, 12.

PARTNERSHIP—*Action for Account—Single Error—Liberty to surcharge and falsify—Errors appearing on Books.*] Where an account is impeached, if a single important error is established, the Court will not, except in the case of fraud, order the whole account to be opened, but will make a decree that the Plaintiff may be at liberty to surcharge and falsify.—In a partnership action, where one error of £950 was established in an account long settled:—*Held*, that in taking the accounts the Plaintiff should be at liberty to surcharge and falsify, and that such liberty should not be limited to errors appearing from the books. Gething *v.* Keighley - - - 547

2. —— *Accounts—Variation of Articles—Money Interests not altered.*] By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady Day and Michaelmas, and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the accounts should be settled once a year only, viz., at Michaelmas:—*Held*, that this variation in the partnership articles did not affect the money interests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March. Lawes *v.* Lawes 98

—— Voluntary society—Sale of society's property - - - - 78
See Company. 3.

PARTY-WALL—Undermining by adjoining owner
See Metropolitan Building Act. [68

PATENT—*Validity—Novelty—Partial Anticipation of Invention—Threatened Infringement—Imitation for Purpose of Experiment—Injunction.*] A specification is not invalid by reason of its describing an invention part of which was not new at the date of the patent, if, after eliminating what was old, a residue is left of sufficient utility, in which case the residue, if properly claimed, will be a proper subject-matter for the grant of letters patent.—A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place.—When articles which are the subject of a patent are made without a license from the patentee simply for the purpose of *bonâ fide* experiments, those who so make them are not

PATENT—*continued.*
necessarily liable to an action, but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights, and will be restrained by injunction. FREARSON *v.* LOE - - 48

—— Infringement—Property of foreign sovereign
See JURISDICTION. [351

PAYMENT OUT OF COURT—Trustee Relief Act
See TRUSTEE RELIEF ACT. 1. [185

—— - - - - - - 388
See WOMAN PAST CHILD-BEARING.

PERSONA DESIGNATA—Gift to - - 117
See WILL. 10.

PETITION—Adjudication of bankruptcy - 307
See BANKRUPTCY. 1.

—— Trustee Relief Act - - - 185
See TRUSTEE RELIEF ACT. 1.

PLAN OF BUILDING—Approval of by Board
See PUBLIC HEALTH ACT, 1875. [677

PLEADING - - - - 34, 552
See PRACTICE. 6, 11.

POLICY HOLDERS—Winding-up petition
See COMPANY. 6.

POLICY OF INSURANCE—Mortgage of - 137
See INSURANCE.

—— Payment into Court—Trustee Relief Act 80
See TRUSTEE RELIEF ACT. 2.

PORTIONS—Satisfaction - - - 363
See WILL. 11.

POWER—*Appointment—Excessive Exercise—Contingent Class—Objects—Non-Objects—Ascertainment at Future Period.*] The donee of a power to appoint a fund in favour of her own issue, "such issue to be born before any such appointment," by deed, after reciting the power and her desire to exercise it, and the state of her family, appointed the fund to her daughter for life, and after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one.—At the date of the appointment the daughter had three children living (including one *en ventre sa mère*), and she had three born afterwards. One of the children had attained twenty-one, and the rest were minors:—*Held*, first, that issue in existence at the date of the deed of appointment were the only objects of the power. Secondly, that upon the construction of the deed the intention of the appointor was to include non-objects, *i.e.*, issue born after that date. Thirdly, that the appointment was not thereby bad *in toto;* but that, fourthly, the share of each object would be determined by the total number of objects and non-objects who should fall within the class in whose favour the appointment purported to be made. Under the circumstances, one sixth of the fund in Court directed to be at once paid out to the child who had attained twenty-one, and the remainder to remain in Court, and the dividends thereon to be accumulated. *In re* FARNCOMBE'S TRUSTS - - - - - 652

PRACTICE—*Appeal from Motion to discharge Order of Judge in Chambers—Time within which such Motion may be brought—Judicature Act*, 1873, *s.* 50—*Rules of Court*, 1875, *Order* LVIII., *r.* 15.] Where a motion has been made under the 50th section of the *Judicature Act*, 1873, to a Divisional Court or Judge in Court, to discharge an order made by a Judge in Chambers, an appeal lies within twenty-one days to the Court of Appeal from an order refusing such motion.—Order LVIII., rule 15, of Rules of Court, 1875, limiting the time for bringing appeals, does not apply to the time for making motions before a Divisional Court or a Judge in Court to discharge an order in Chambers; but in the Chancery Division the practice is, that no such motion shall be made without special leave after twenty-one days. DICKSON *v.* HARRISON - - - - C. A. 243

2. —— *Consolidation of Actions—Test Action—Abortive Trial—Substitution of another Action as Test Action—Indemnity against Costs—Rules of Court*, 1875, *Order* LI., *r.* 4.] One of a number of actions brought by different Plaintiffs against the same Defendants in respect of an alleged misrepresentation in the prospectus of a company, was ordered to be a test action, the trial of which was to bind all the Plaintiffs but not to bind the Defendants. When the test action came on for trial the Plaintiff did not appear, and judgment was given for the Defendants:—*Held*, that, though the order contained no express provision to that effect, the Court had power to substitute another of the actions as the test action, and that, as the trial of the original test action had failed to be a real trial of the issue between the Plaintiffs and the Defendants without any fault of the other Plaintiffs, this substitution ought to be made.—In the absence of agreement the Plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other Plaintiffs. AMOS *v.* CHADWICK - C. A. 459

3. —— *Costs—Legal Personal Representative—Revivor.*] A Plaintiff died after having obtained a decree with costs, and having appointed one of the Defendants, who had a concurrent interest with her, her executor. Two others of the Defendants served notice of appeal. The executor after this obtained the common order of revivor. The appeal afterwards came on to be heard, and the bill was dismissed with costs as against the Appellants:—*Held*, that the executor had adopted the suit for all purposes, and that the costs were payable by him personally, and not merely out of the estate of the original Plaintiff. BOYNTON *v.* BOYNTON - - - - C. A. 250

4. —— *Costs—Shorthand Notes—Taxation.*] On the hearing of an application before Vice-Chancellor *Malins*, the solicitors of the Plaintiff and Defendant agreed that a shorthand writer should be employed at the joint expense of the Plaintiff and Defendant to take notes of the proceedings. An order was made in favour of the Defendant, from which the Plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writer's notes. The Taxing Master, in taxing the Defendant's costs of the appeal, disallowed the costs of copies of the shorthand notes, except those of the judgment of the Vice-Chancellor,

PRACTICE—*continued.*

and also disallowed the sum paid by the Defendant to the shorthand writer:—*Held*, by Vice-Chancellor *Malins*, that both the above items ought to be allowed:—*Held*, by the Court of Appeal, that the Taxing Master could not allow these items without a special direction from the Court, and that as the Court of Appeal in dismissing the appeal had not given any directions as to them, they could not be allowed, and that the agreement between the solicitors did not make any difference in the case. ASHWORTH *v.* OUTRAM [C. A. 483

5. —— *Costs—Taxation—Party and Party—Costs of three Counsel—Copies of Shorthand Writer's Notes of Evidence.*] In a case of considerable complication, in which charges of fraud were made against the Defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the Taxing Master had only allowed the costs of two.—The rule laid down by *Turner*, L.J., in *Pearce* v. *Lindsay* (1 D. F. & J. 573) explained.—The costs of making for the use of counsel copies of a shorthand writer's notes of evidence taken at the trial will not be allowed as between party and party, unless a special direction to that effect is given by the Judge at the trial. KIRKWOOD *v.* WEBSTER - - - 239

6. —— *Demurrer to amended Statement of Claim—Partial Demurrer.*] A Defendant put in a statement of defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The Defendant obtained leave to amend his statement of defence, and put in a statement of defence and a demurrer to part of the statement of claim:—*Held*, that the rule of Chancery practice, that a Defendant cannot demur to what he has previously answered, is no longer in force; that leave to amend the statement of defence authorized the putting in a demurrer to part of the statement of claim; and that the Defendant's pleading was regular.—A demurrer "to such part of the amended statement of claim as claims damages alleged to have been sustained by reason of the alleged wrongful acts of the Defendant in opening the accounts therein in that behalf referred to":—*Held*, good in form. POWELL *v.* JEWESBURY - - C. A. 34

7. —— *Discovery—Delivery of Interrogatories by Plaintiff before Statement of Defence—Rules of Court*, 1875, *Order* XXXI., *r.* 5.] In an action in the Chancery Division interrogatories may be delivered before the statement of defence.—*Mercier* v. *Cotton* (1 Q. B. D. 442) applies only to actions in the nature of Common Law actions. HARBORD *v.* MONK - - - - - 616

8. —— *Evidence—Information and Belief—Interlocutory Application—Setting aside Compromise.*] A decree was made by consent ordering the Defendant to give a bond for payment of a certain sum to the Plaintiff, and to deposit certain shares as security. Subsequently a compromise was come to by which the Plaintiff agreed to accept a smaller sum on the ground of the poverty of the Defendant. The Plaintiff afterwards moved to enforce the decree, notwithstanding the compromise, on the ground that he had been induced

PRACTICE—*continued.*

to enter into the compromise by misrepresentation. In support of this it was shewn that shortly before the compromise was signed the Defendant's father, who was believed by all parties to be a man of property and had refused to assist the Defendant, had died, which fact was known to the Defendant's solicitor when the compromise was agreed to but was not known to the Plaintiff's solicitor. The Plaintiff's solicitor deposed that as "he was informed and believed" the Defendant's father had died intestate, and the Defendant had become entitled to a share of his estate, more than sufficient to meet all his liabilities. At the interview when the compromise was agreed to, the Defendant's solicitor repeated the statement previously made as to the Defendant's father having refused to assist him. An order having been made by *Malins*, V.C., giving the Plaintiff leave to enforce the decree notwithstanding the compromise:—*Held*, on appeal, that the question whether the compromise was invalid ought to have been made the subject of a new action, and ought not to have been tried on a motion of this nature; but that as the case had been argued on the merits in the Court below without this objection being insisted on, the objection could not be taken in the Court of Appeal; and the Court being of opinion that the order was right on the merits, it was affirmed.—Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it; but if in the Court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal. GILBERT *v.* ENDEAN - - - C. A. 259

9. —— *Injunction—Jurisdiction of High Court—Common Law Procedure Act*, 1854, *ss.* 79, 81, 82—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Arbitration—Unfitness of Arbitrator.*] The extensive jurisdiction of granting injunctions originally given to the Common Law Courts by the *Common Law Procedure Act*, 1854, ss. 79, 81, and 82, is now vested, by virtue of the *Judicature Act*, 1873, in the High Court of Justice. All acts, therefore, which a Common Law Court, or a Court of Equity only, could formerly restrain by injunction, can now be restrained by the High Court.—The jurisdiction of granting injunctions thus vested in the High Court is practically unlimited, and can be exercised by any Judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles. —The Court will restrain an arbitrator by injunction from acting, in any case in which he is, in the opinion of the Court, unfit or incompetent to act. BEDDOW *v.* BEDDOW - - - 89

10. —— *Interrogatories—Rules of Court*, 1875, *Order* XXXI., *rr.* 4, 5, 8.] Upon an application for leave to serve interrogatories on a member of a company which is a party to an action, leave will be given where the Judge is satisfied that the member sought to be interrogated is likely to be able to give discovery; and the Judge is not bound at this stage of the proceedings to consider the propriety of the proposed interrogatories. BERKELEY *v.* STANDARD DISCOUNT COMPANY 643

PRACTICE—*continued.*

11. —— *Parties — Officer of Corporation, Joinder of, as Defendant for Purpose of Discovery —Rules of Court*, 1875, *Order* XVI., *r.* 14; *Order* XXXI., *r.* 4—*Representative Action on behalf of Bondholders—Dissentient Bondholder joined as Defendant—Practice—Absent Parties—Form of Proceeding.*] In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a Defendant for the purpose of discovery:—*Held*, on motion, that, inasmuch as under Rules of Court, 1875, Order XXXI., r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as Defendant, and that, under Order XVI., r. 14, his name should be struck out. —In a representative action by a Plaintiff on behalf of himself and all other bondholders:—*Held*, on motion, that a dissentient bondholder—it not appearing that there were any others who dissented—should be added as a Defendant, but not in a representative character.—Such applications should, in general, be by summons in Chambers.—In an interlocutory application with which some of the parties to the action who had no interest in such application were not served, an order *nisi* was made to be binding on the absent parties three days after service unless they shewed cause. WILSON *v.* CHURCH - 552

12. —— *Parties — Administrator ad litem—Judicature Act*, 1873, *s.* 24, *sub-s.* 7.] *W.*, claiming to be one of the next of kin of an intestate, took out letters of administration to her estate, and divided the residue among the supposed next of kin, including himself. Afterwards *W.* died, and then the Plaintiff, who claimed to be sole next of kin, and disputed the title of *W.* and the other supposed next of kin, brought a suit against *W.'s* executors, calling upon them to refund a fixed sum of money, which had been agreed on as the net residue of the intestate's estate come to the hands of *W.* as administrator; and praying that so far as might be necessary the estate of the intestate might be administered by the Court. The administrator *ad litem* of the intestate's estate left unadministered by *W.* was made a Defendant to the suit:—*Held* (affirming the decision of *Hall*, V.C.), that although the only object of the suit was to establish the title of the Plaintiff as sole next of kin, a general administrator of the intestate's estate was a necessary party to the suit, and not merely an administrator *ad litem*. DOWDESWELL *v.* DOWDESWELL - C. A. 294

13. —— *Production of Documents — Court Rolls—Action by a Person claiming adversely to the Lord.*] The Plaintiffs claimed to be owners in fee simple of certain land, and the Defendant alleged that they were freehold tenants of a manor of which he was the lord; and that they had only customary rights over the land. The Plaintiffs asked for inspection of the Court rolls of the manor:—*Held* (reversing the decision of *Bacon*, V.C.), that they were not entitled to inspection. OWEN *v.* WYNN - - - - C. A. 29

14. —— *Receiver—Judgment Creditor*—27 & 28 *Vict. c.* 112, *s.* 1—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Rules of Court, Order* XLII., *rr.* 1, 23.] A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an elegit against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the Court might direct, and asking for a receiver. The Plaintiff then moved for a receiver in the new action:—*Held*, by *Hall*, V.C., and by the Court of Appeal, that the statute 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before the statute 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the Plaintiff was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.—Whether the appointment of a receiver could have been obtained in the old action, *quære*. —Discussion of the powers given to the Court of appointing receivers by *Judicature Act*, 1873, s. 25, sub-s. 8. ANGLO-ITALIAN BANK *v.* DAVIES [C. A. 275

15. —— *Special Referee — Reference as to Damages—Power of Court to review Report of Referee—Judicature Act*, 1873, *ss.* 56, 57—*Rules of Court*, 1875, *Order* XXXVI., *r.* 34.] When a Judge has referred the amount of damages in an action to a special referee, he may accept it wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit to the referee for amendment, but he has no power to alter or vary it.—The Master of the Rolls referred the amount of damages to a special referee, and on the report being made, being dissatisfied with the principle on which the referee had proceeded, assessed the damages himself, using for the purpose the shorthand notes of the evidence heard before the referee. The Court of Appeal reversed his decision, and remitted the case to the referee to rehear the matter, with liberty to report specially on any facts.—Whether a referee ought to state his reasons, *quære*. DUNKIRK COLLIERY COMPANY *v.* LEVER - - - - - C. A. 20

16. —— *Staying Proceedings pending Appeal —Jurisdiction of Court of Appeal—Rules of Court*, 1875, *Order* LVIII., *rr.* 16, 17.] An application to the Court of Appeal, under Rules of Court, 1875, Order LVIII., rules 16 and 17, to stay the proceedings under a judgment pending an appeal to that Court, inasmuch as it cannot be made until after an application has been made to the Court of first instance, is not an original motion, but a motion by way of appeal, though it need not be formally entered as an appeal.—Observations of *Mellish*, L.J., in *Cooper* v. *Cooper* (2 Ch. D. 492) explained. ATTORNEY-GENERAL *v.* SWANSEA IMPROVEMENTS AND TRAMWAYS COMPANY - - - - - C. A. 46

17. —— *Trade-Mark—Opposing Registration —"Case standing for Determination of Court"—Trade Marks Registration Acts*, 1875-1877—*Trade-Marks Rules*, 1876, *r.* 16—*Costs of Proceedings before Registrar of Trade-Marks—Jurisdiction of Court to order Payment of—"Costs of and incident to Proceedings in High Court"—Rules of Court*,

PRACTICE—*continued.*
1875, *Order* LV.] "The costs of and incident to all proceedings in the High Court" (Rules of Court, 1875, Order LV.), means the costs of and incident to all proceedings that have actually come into the High Court.—A case under the Trade Marks Registration Acts, 1875-1877, does not "stand for the determination of the Court," within the 16th Rule of the Trade-Marks Rules, 1876, until the parties opposing registration have given security for costs as provided by that rule.—Upon an application by summons for the registration of a trade-mark being refused with costs, the Court, in exercising the discretionary power given to it by Rules of Court, 1875, Order LV., as to the costs "of and incident to all proceedings in the High Court," has only jurisdiction to order the payment of costs incurred since the case "stood for the determination of the Court" under the Trade-Marks Rules, 1876, r. 16, that is, from the time of the parties opposing registration giving security for costs as provided by that rule, and has no power to order payment of the costs of the previous proceedings before the Registrar of Trade-Marks. *In re* BRANDRETH'S TRADE-MARK - - - - - - 618

18. —— *Trial—Judgment in Default of Appearance—Application to set aside Judgment—Negligence of Solicitor—Rules of Court*, 1875, *Order* XXXVI., *r.* 20.] A Defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one Judge of the Chancery Division to another, and had therefore only watched the list before the former Judge:—*Held*, by *Fry*, J., that the solicitor had been guilty of gross negligence, and that the judgment which had been given for the Plaintiff could not be set aside under Rules of Court, 1875, Order XXXVI., r. 20:—*Held*, on appeal, that the judgment must be set aside on payment of the costs of the day. BURGOINE *v.* TAYLOR - - - C. A. 1

—— Bankruptcy - - 271, 333, 698
See BANKRUPTCY. 2, 11, 12.

—— Trustee Relief Act - - - 185
See TRUSTEE RELIEF ACT. 1.

PRECATORY TRUST - - - - 96
See WILL. 2.

PRESUMPTION—Knowledge of contents of company's books—Director - - 329
See COMPANY. 4.

PRINCIPAL AND AGENT—*Agency—Commission—Overcharges—Knowledge of Principal—Opening settled Accounts.*] Where accounts are impeached and it is shewn that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the Court will make a similar order if such accounts are shewn to contain a less number of errors, or if they contain any fraudulent entries.—*Semble*, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by

PRINCIPAL AND AGENT—*continued.*
one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim. WILLIAMSON *v.* BARBOUR 529

PRIORITY — Mortgage — Notice — Solicitor — Registration - - - 189
See SOLICITOR. 1.

PRODUCTION OF DOCUMENTS - - 29
See PRACTICE. 13.

PROFITS—Bequest of—Apportionment - 159
See APPORTIONMENT.

—— Coal mine—Allowances - - 685
See MINE.

PROOF—Bankruptcy - - - 704
See BANKRUPTCY. 9.

PROPERTY OF FOREIGN SOVEREIGN—Right to restrain removal - - 351
See JURISDICTION.

PROPERTY TAX—Priority—Winding-up - 469
See COMPANY. 7.

PUBLIC HEALTH ACT, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 158—*Local Government Board—Rebuilding—Depositing Plans—Approval—Allowing Work to proceed—Pulling down—Notice.*] The owner of a house after having, in accordance with a by-law of the Local Government Board, left, on the 16th of October, a plan of an intended new building, the local board passed a resolution that the plan was approved of, and that he should be offered £40 for certain land of his thrown into the street. He refused to accept the £40 but proceeded with his works, and by the 26th of October had pulled down the front wall of his house. On the 27th of October the board passed a resolution abandoning the terms before offered, and requiring him to set his frontage further back. This notice was given under sect. 155 of the *Public Health Act*, 1875, as on the front of a house having been pulled down. On the 27th of November the owner of the house proceeded with his building, and on the 21st of December he was served with notice to pull down his new building:—*Held*, that the local board having approved of a plan, and having allowed a house-owner to proceed and pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down:—*Held*, that where a local board has not, during the month prescribed by the *Public Health Act*, s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan. A local board cannot, under sect. 158, pull down a building without giving the owner an opportunity of shewing cause why it should not be pulled down. MASTERS *v.* PONTYPOOL LOCAL GOVERNMENT BOARD - - - 677

RAILWAY — *Adjoining Landowner—Easement over Railway—Superfluous Land—Abandonment.*] A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway.—A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway.—A railway company is liable to an action for nuisance for

RAILWAY—*continued.*
using their rights so as to injure the neighbouring landowner where they might use them without such injury.—A railway company may by their conduct abandon land outside their fence which was formerly theirs, so as to permit the adjoining owner to acquire such land by adverse possession. Norton *v.* London and North Western Railway Company - - - - - 623

2. —— *Vendor's Lien against Railway Company—Motion for Injunction and Receiver before Judgment.*] Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the Court will not grant an injunction or a receiver against the company before judgment has been obtained in the action, even though the company admit their liability. Latimer *v.* Aylesbury and Buckingham Railway Company - C. A. 385

REBUILDING—Line of - - - 677
See Public Health Act, 1875.

RECEIVER—Judgment creditor - - 275
See Practice. 14.

—— Railway company - - - 385
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REFEREE—Power of Court to review report 20
See Practice. 15.

REGISTER—Shareholders of company - 329
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REGISTRATION—Bill of sale - 389, 419
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—— Company - - - - 560
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See Solicitor. 1.

—— Resolution for liquidation - 398, 466
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—— Trade-mark—Costs - - - 618
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RENT—Bankruptcy—Liability of trustee - 252
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REPORT OF REFEREE—Power of Court to review - - - - - 20
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RETAINER — Executor—Legacy to bankrupt debtor - - - - 673
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—— Mortgagee executor of mortgagor — Surplus - - - - - 568
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REVERSIONARY INTEREST — Mortgage of—Recovery of interest - - 143
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—— **Order XXXI., r. 4** - - - 552
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—— —— **rr. 4, 5, 8** - - - - 643
See Practice. 10.

—— —— **r. 5** - - - - 616
See Practice. 7.

—— **Order XXXVI., r. 20** - - - 1
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—— —— **r. 34** - - - - 20
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—— **Order XLII., rr. 1, 23** - - - 275
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—— **Order LV.** - - - - 618
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—— **Order LVIII., rr. 9, 15** - - 221, 698
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—— —— **r. 15** - - - - 243
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—— —— **rr. 16, 17** - - - - 46
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SALE—Settled Estates Act - - - 116
See Settled Estates Act.

SATISFACTION—Will—Double portions - 363
See Will. 11.

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See Bankruptcy. 11. [271

—— Winding-up petition - - - 635
See Company. 6.

SEISIN—Meaning of word—Will - - 42
See Will. 5.

SEPARATE USE—Loss of trust fund—Assent of married woman - - - 587
See Husband and Wife.

SERVICE—Substituted—Bankruptcy - 333
See Bankruptcy. 2.

SET-OFF—*Legacy to Bankrupt Debtor—Retainer—Dividend.*] A week before the death of a testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bankrupt. The debt was never proved by the testatrix in her lifetime or by her executors after her death, nor had any dividend been declared in the bankruptcy.—*Held* (following *Cherry* v. *Boultbee* (2 Keen, 319; 4 My. & Cr. 442)), that the executors of the testatrix were not entitled to set off or retain the amount of the debt due to the testatrix against the share of the bankrupt; nor, under the circumstances, any amount in respect of dividend on such debt. *In re* Hodgson, Deceased. Hodgson *v.* Fox 673

—— Voluntary winding-up—Calls—Debt from company - - - - 595
See Company. 8.

SETTING ASIDE JUDGMENT—Foreclosure 594
See Mortgage. 3.

SETTLED ESTATES ACT, 1877 (40 & 41 *Vict.* c. 18), *s.* 16—*Sale out of Court.*] A sale out of

SETTLED ESTATES ACT, 1877—*continued.*
Court may be directed under the *Settled Estates Act*, 1877, the purchase-money being brought into Court; and such a sale may be authorized to be made by public auction or private contract, subject to a reserved price to be fixed by the Judge in Chambers. *In re* Adams' Settled Estates 116

SETTLEMENT—*Covenant to settle future Property of Wife — Marriage Settlement.*] A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnization of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:—*Held*, that it was not within the covenant.—A petitioner applied for payment out of Court of the whole of a fund, his title to one moiety of which was not disputed. The Court below ordered payment to him of one moiety only:—*Held*, that an appeal from this order was not an appeal from the refusal of an application, and that the time for appealing did not begin to run till the order was drawn up. *In re* Michell's Trusts - - C. A. 5

—— Power of investment—23 & 24 Vict. c. 38, s. 11 - - - - - 112
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SHARES—In name of trustee - - 164
See Company. 7.

SHORTHAND NOTES—Costs of - 239, 483
See Practice. 4, 5.

SOLICITOR — *Mortgage—Priority—Trustee—Possession of Deeds—Register—Notice.*] The Plaintiff through his solicitor contributed £500 and the solicitor £300 to a loan of £800 on deposit of deeds. The solicitor subsequently took a mortgage to himself for the £800. The solicitor afterwards deposited the title-deeds of the mortgaged property, with a bank as security for a loan of £400:—*Held*, that the Plaintiff had priority for his £500 over the security to the bank.—The Plaintiff had lent money to a solicitor on the security of the deposit of title-deeds of land in *Middlesex* with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:—*Held*, that the client must be presumed to have had notice of the Plaintiff's charge, which therefore, though unregistered, retained priority.—The presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts. Bradley *v.* Riches - - - - - 189

SOLICITOR—*continued.*
2. —— *Separate Bills of Costs in the same Bankruptcy—Taxation after Twelve Months—6 & 7 Vict. c. 73, s. 37.*] The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.—Accordingly, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of *S.*, a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down,—on an application by *S.* to tax both bills, more than twelve months after the delivery of the first:—*Held*, that they must be treated as separate bills, and that the second bill only could be taxed. —*In re Street* (Law Rep. 10 Eq. 165) commented on. *In re* Hall & Barker - - - 538

SPECIFIC PERFORMANCE—*Variation — Pleading—Misrepresentation—Person contracted with.*] In defence to an action for specific performance of a contract as expressed in a document stated by the Plaintiffs, the Defendant pleaded that the document did not contain the true terms for the purchase, but he did not state what the true terms were. The Defendant afterwards produced a written agreement for purchase containing terms differing from those in the document stated by the Plaintiffs. The Plaintiffs amended their statement of claim, but continued to claim specific performance of the contract as stated by them:—*Held*, that, the Plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the Defendant, the action would not be dismissed, but judgment would be given for specific performance with the variation.—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. Smith *v.* Wheatcroft - - - 223

—— Sale of land—Abatement - - 180
See Vendor and Purchaser.

STATUTE—*Date—Operation of Statute—Judicature Act*, 1873, *s.* 25, *sub-s.* 1.] Sub-sect. 1 of the *Judicature Act*, 1873, came into operation on the passing of the Act.—A testator died on the 15th of May, 1875, and an order for the administration of his estate was made on the 22nd of June, 1875: —*Held*, that the rights of a secured creditor were governed by sect. 25, sub-sect. 1, of the Act of 1873. Hilton *v.* Jones - - - 620

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9 Geo. 2, c. 36—*Mortmain* - 337, 576
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3 & 4 Will. 4, c. 27, s. 42—*Limitations* - 143
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1 Vict. c. 26, s. 24—*Wills* - - - 667
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6 & 7 Vict. c. 73, s. 37—*Solicitors* - 533
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8 Vict. c. 18, s. 92—*Lands Clauses* - 425
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10 & 11 Vict. c. 96—*Trustee Relief Act* 80, 185,
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17 & 18 Vict. c. 113—*Locke King's Act* 12
See ADMINISTRATION. 2.

17 & 18 Vict. c. 125, ss. 79, 81, 82—*Common Law Procedure* - - - 89
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18 & 19 Vict. c. 122, ss. 83, 85—*Metropolitan Building Act* - - - 68
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23 & 24 Vict. c. 38, s. 11—*Law of Property* 112
See TRUSTEE. 3.

25 & 26 Vict. c. 89, s. 20—*Companies* - 560
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—— —— ss. 38, 101, 138 - - 595
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—— —— s. 115 - - - - 164
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27 & 28 Vict. c. 112, s. 1—*Judgments* - 275
See PRACTICE. 14.

30 & 31 Vict. c. 69—*Administration* - 12
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30 & 31 Vict. c. 144—*Insurance* - - 137
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32 & 33 Vict. c. 71, s. 6—*Bankruptcy* - 307
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—— —— ss. 20, 23, 24 - - - 252
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—— —— s. 48 - - - - 694
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—— —— ss. 82, 125 - - - 466
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—— —— s. 125, sub-s. 9, 10 - 398, 701
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—— —— s. 164 - - - - 322
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33 & 34 Vict. c. 35—*Apportionment* - 159
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33 & 34 Vict. c. 61, s. 21—*Life Assurance Companies* - - - - 635
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36 & 37 Vict. c. 66, s. 24, sub-s. 7—*Judicature Act* - - - - - 294
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—— —— s. 25, sub-s. 1 - - - 620
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—— —— —— sub-s. 6 - - - 307
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36 & 37 Vict. c. 66, s. 25, sub-s. 8 89, 275
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—— —— s. 50 - - - - 243
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38 & 39 Vict. c. 55, ss. 155, 158—*Public Health*
See PUBLIC HEALTH ACT. [677

38 & 39 Vict. c. 77, ss. 9, 16, 18—*Judicature Act* - - - - - 271
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38 & 39 Vict. c. 87, s. 48—*Land Transfer* 582
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40 & 41 Vict. c. 18, s. 16—*Settled Estates Act*
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STATUTORY OBLIGATION - - - 503
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STAYING PROCEEDINGS—Appeal - 46
See PRACTICE. 16.

STOCKBROKER — *Solicitor— Payment—Notice—Stock Exchange Rules.*] Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker whom the solicitor had employed in stock exchange speculations directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase-money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:—*Held*, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance.—*Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) commented on.—The sale was made subject to the rules of the *Stock Exchange*, and the stockbroker alleged that by those rules the broker could recognise only the person employing him, and obey his directions as to the disposal of the proceeds of a sale:—*Held*, that the rules of the *Stock Exchange* applied only to the sale on the *Stock Exchange*, and not to subsequent transactions.—*Held*, also, that no such rule or custom was proved, and that no such rule or custom could be upheld. PEARSON *v.* SCOTT [198

SUBSTITUTED SERVICE—Bankruptcy - 333
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SUPERFLUOUS LAND—Railway company 623
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—— Partnership accounts - - - 547
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—— Solicitor's bill of costs - - - 538
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TEST ACTION—Substitution of another action
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TIME—Appeal—Order in Chambers - 243
See PRACTICE. 1.
—— Lapse of—when a bar - - - 176
See DELAY.
TOMB—Repair of - - - - 576
See CHARITY. 2.

TRADE-MARK — *Exporting Agent — Custom of Trade—Manchester.*] An arrangement was made between *W.*, *R.*, and *G.*, that *W.*, a manufacturer, should consign cotton cloths to *G.* in *Rangoon*, paying him an inclusive commission. The goods were to be exported through *R.*, who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from *G.* A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of *R.'s* name and arms, and of a symbol which had formerly been used by *G.* After goods had been regularly exported for some years under this arrangement, *W.* ceased to send goods through *R.*, and commenced exporting them to *Rangoon* through the agency of *F.* continuing to use the old mark except that the name and arms of *F.* were substituted for those of *R.* At the same time *R.* commenced exporting other goods under the old mark.—Cross actions were commenced for injunctions, in which *R.* set up an alleged custom in *Manchester*, giving the right to the trade-marks to the shipping agent:—*Held*, upon the evidence, that no such custom existed.—*Held*, also, that neither *R.* nor *W.* had any exclusive right to the use of the mark, and that both actions must be dismissed. ROBINSON *v.* FINLAY. WARD *v.* ROBINSON - - - - - - C. A. 487

—— Costs of opposing registration - 618
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TRIAL—Setting aside judgment - - 1
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TRUST—Declaration of—Imperfect assignment
See VOLUNTARY SETTLEMENT. [113

TRUSTEE—"*Bare Trustee*"—*Vendor and Purchaser—Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 48—*Unpaid Vendor.*] A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the *Land Transfer Act*, 1875, s. 48.—Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase money and execution of the conveyance was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the Act, so that upon his death, the money still remaining unpaid and the conveyance unexecuted, the legal estate passed to his heir-at-law.—*Quære*, whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the Act.—*Christie* v. *Ovington* (1 Ch. D. 279) considered. MORGAN *v.* SWANSEA URBAN SANITARY AUTHORITY - 582

2. —— *Breach of Trust—Married Woman—Trust for Separate Use—Payments of Dividends to Husband—Assent of Wife—Right to recover Arrears of Dividends.*] The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her:—*Held*, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced. DIXON *v.* DIXON - - 587

3. —— *Powers of Investment*—23 & 24 *Vict. c.* 38, *s.* 11.] Trustees of settlements coming within the operation of *Lord St. Leonards' Act*, 1860 (23 & 24 Vict. c. 38), may invest the trust funds in any securities in which cash under the control of the Court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust. *In re* WEDDERBURN'S TRUSTS [112

—— Breach of trust—Assent of married woman
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—— For creditor—Right to petition in bankruptcy - - - - 307
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—— Right to bring foreclosure action - 212
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TRUSTEE IN LIQUIDATION - - 398
See BANKRUPTCY. 8.

TRUSTEE RELIEF ACT (10 & 11 *Vict. c.* 96), *s.* 2—*Payment Out—Petition—Action.*] Applications for payment out of Court of a fund paid in under the *Trustee Relief Act* must be made by petition and not by action; and a person not named in the trustee's affidavit may petition for payment out of Court. But where an action has been brought the Court may make a declaration of right, leaving the payment to be obtained on petition. PELLING *v.* GODDARD - - - - 185

2. —— *Policy Money—Assurance Society—Action by Assignee—Payment into Court—Costs.*] Money payable under a policy by a life assurance society on the death of the assured is not money held upon any trust, and cannot properly be paid into Court under the *Trustee Relief Act*.—On an action by the assignee of a policy against an assur-

TRUSTEE RELIEF ACT—*continued.*

ance society, where a difficulty had arisen as to the title to the money, the Court being satisfied that the Plaintiff was entitled:—*Held*, that the company had not discharged themselves by paying the money due on the policy into Court, and that they must pay to the Plaintiff the amount (which on petition would be ordered to be transferred to them), with interest and costs.—*In re Hall* (10 W. R. 37), *In re United Kingdom Assurance Company* (34 Beav. 493), and *In re Webb's Policy* (Law Rep. 2 Eq. 456), commented on MATTHEW *v.* NORTHERN ASSURANCE COMPANY - - 80

3. —— *Summons—Legacy.*] *Semble*, under the present practice, when it is doubtful to whom a legacy is payable, the better course is not by payment into Court under the *Trustee Relief Act*, but by an administration summons, waiving accounts, simply for the purpose of obtaining the decision of the Judge, or, after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the Judge.—If the executor does pay it in he will be left to take his costs out of the residuary estate, and will not have them out of the legacy. *In re* BIRKETT - 576

UNDERMINING PARTY-WALL - - 68
See METROPOLITAN BUILDING ACT.

UNDISCHARGED DEBTOR - - 312
See BANKRUPTCY. 10

VARIATION—Contract—Specific performance
See SPECIFIC PERFORMANCE. [223

VENDOR AND PURCHASER—*Specific Performance—Vendor entitled to Part only.*] Where two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:—*Held*, that a judgment for specific performance with abatement might be made against the former. HORROCKS *v.* RIGBY - - - - 180

—— Unpaid vendor—Bare trustee - - 582
See TRUSTEE. 1.

—— Unpaid vendor—Railway company - 385
See RAILWAY. 2.

VOLUNTARY SOCIETY—Sale of society's property - - - - - 78
See COMPANY. 3.

VOLUNTARY SETTLEMENT — *Declaration of Trust.*] A husband by deed-poll recited as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman," several leasehold houses and the ground-rents thereof.—The deed was voluntary:—*Held*, that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust. BADDELEY *v.* BADDELEY - - 113

VOLUNTARY WINDING-UP - 469, 595
See COMPANY. 7, 8.

WIFE'S FUTURE PROPERTY - - 5
See SETTLEMENT.

WILL — *Construction — Absolute Interest — Consumable Articles — Farming Implements — "Not accountable for Depreciation."*] A testator gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock, and after her decease he gave the residue of his personal estate to his children:—*Held*, that the widow took an absolute interest in the farming implements and stock. BRETON *v.* MOCKETT - - 95

2. —— *Construction—Absolute Interest—Precatory Trust.*] A testator gave his wife the whole of his real and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children":—*Held*, that this was not a gift coupled with a trust, and that the widow took an absolute interest in the property. PARNALL *v.* PARNALL - 96

3. —— *Construction — Annuity — Corpus or Income—Direction to set apart Investments to produce Annuity—Bequest of Residue—Deficiency of Income—Annuitant not entitled to Corpus.*] Testator empowered his trustees to make demises of his estate or part of it for building purposes, and also to sell all his residuary real and personal estate and to invest the proceeds, and directed them to set apart a sufficient portion of such investments to produce an annuity of £1200, which he bequeathed to his wife for her life, payable quarterly, and he gave the entire residue of his estate after his wife's death for the benefit of his children. The income of the property was not sufficient to provide for the widow's annuity:—*Held*, that the widow was not entitled to have the deficiency raised out of the corpus of the trust estate. GEE *v.* MAHOOD - - - 151

4. —— *Construction — Blended Realty and Personalty—Gift of, in Remainder—"Brothers and Sisters then Living, or their Heirs"—Heir-at-Law—Next of Kin—Period of Ascertainment.*] A testatrix by her will gave all her personal and also all her real property to trustees in trust for payment of her debts and legacies, and subject thereto between her five sisters, *nominatim*, and the survivor of them, in equal shares during their lives and spinsterhood, "and upon the death or marriage of all her said sisters," she willed that "her said property should be divided in equal proportions between her brothers and sisters then living or their heirs."—The testatrix had six brothers and six sisters. Of these, one brother died before the testatrix was born, one sister died in the lifetime of the testatrix, but before the date of the will; two brothers and one sister died in her lifetime and after the date of the will, and the rest survived her, the last survivor of them being a sister:—*Held*, first, that the word "or" in the gift in remainder could not be read "and," and therefore that there was no intestacy:—Secondly, that as to the personal estate comprised in the gift, the word "heirs" must be construed statutory next of kin (which would include widows), and as to the real estate, heirs-at-law:—Thirdly, that such heirs-at-law and statutory next of kin of the brothers and sisters of the testatrix were to be respectively

WILL—*continued.*

ascertained, as to the brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as to those who survived her, at their respective deaths:—Fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share: and,—Fifthly, that the heir-at-law and next of kin of the sister who died before the date of the will, as well as the heir-at-law and next of kin of the two brothers and sister who died in the lifetime of the testatrix and after the date of the will, were so entitled.—*De Beauvoir* v. *De Beauvoir* (3 H. L. C. 524) distinguished. WINGFIELD *v.* WINGFIELD - - - - - 658

5. —— *Construction—"Die seised"—Wrongful Possession by Strangers.*] *R.*, being seised of freehold houses, died intestate in 1864, leaving *A.* his sole heiress-at-law. Upon *R.'s* death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. *A.* died in 1871, without ever having entered into possession of the property, having devised to *L.* all real estate (if any) of which she might die seised.—An action having been brought by *L.* against the devisees of *R.'s* widow for recovery of the land:—*Held*, on demurrer (affirming the decision of *Jessel*, M.R.), that "seised," being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as *A.* at the time of her death had no seisin at law or in fact, the property did not pass under her devise. LEACH *v.* JAY - C. A. 42

6. —— *Construction—"Heirs or Next of Kin of A., deceased"—Gift to one Class, not alternative Gift—Statutory Next of Kin.*] Bequest of personalty to the heirs or next of kin of *A.*, deceased:—*Held* to be a gift to one class, namely, the next of kin of *A.*, according to the statute. *In re* THOMPSON'S TRUSTS - - - - 607

7. —— *Construction—"Issue"—"Children."*] A testator by his will gave a fund to trustees "in trust for the lawful issue of *F. H.* surviving him equally to be divided between them if more than one . . . and if but one then for such only child," with a gift over "in default of issue of *F. H.* becoming entitled." The issue of *F. H.* who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter:—*Held*, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter.—*Carter* v. *Bentall* (2 Beav. 551) and *Wyth* v. *Blackman* (1 Ves Sen. 197) discussed. *In re* HOPKINS' TRUSTS - 131

8. —— *Construction — Hotchpot — Sums advanced by Testator—Direction in Will to account—Letters, subsequently, writing off Amounts.*] Testator, who died in 1874, by his will, in 1864, gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot. He advanced to his two sons in and subsequent to 1869 several sums of money, and in 1873 he wrote a letter to each of them, stating that if he would

WILL—*continued.*

give him a promissory note for the sum mentioned he would write off the balance:—*Held*, that, regardless of the letters, the sons must bring the whole of the sums advanced to them into hotchpot. SMITH *v.* CONDER - - - 170

9. —— *Construction—Misdescription—Eldest Son—Heir-at-Law—Gavelkind Heirs.*] A testator devised lands to *William*, the eldest son of the testator's nephew. The nephew had two sons, *John*, the elder, and *William*, the younger:—*Held*, that the devise was to *William*.—A testator made devises of gavelkind lands for lives and in tail, with remainder to his right heirs:—*Held*, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs. GARLAND *v.* BEVERLEY - 213

10. —— *Construction—Persona designata—Bequest to Five Daughters.*] A testatrix bequeathed the residue of her property to be equally divided between the five daughters of *Samuel* and *Mary L.* for their own use:—*Held*, that this was a bequest to the five daughters as *personæ designatæ*, and not as a class. *In re* SMITH'S TRUSTS [117

11. —— *Construction—Portions—Satisfaction—Election—Covenant to settle—Subsequent Will—Parol Evidence.*] *T.*, on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his executors or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six calendar months after her death, transfer to the trustees £2000 consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees or trustee for the time being, should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, and after the decease of the survivor, for such children of the marriage as, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry, and if more than one in equal shares, and in default of children for the husband absolutely. In 1871 *T.* satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing £2800 to trustees in trust for the daughter for life for her separate use, without power of anticipation, and after her decease for such of her children as should attain twenty-one in equal shares:—*Held*, by the Master of the Rolls, that the bequest of the £2800 was intended to be in satisfaction of the testator's liability under his covenant in the settlement, and that such of the parties interested under the settlement as were interested under the will were put to their election.—*Held*, on appeal, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.—Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, and there is no difference in this respect between the cases of a deed and a will. *In re* TUSSAUD'S ESTATE. TUSSAUD *v.* TUSSAUD - - - - C. A. 363

12. —— *Construction — Will speaking from Death — Bequest of Leaseholds at C. — After-*

WILL—*continued.*

acquired Leaseholds at C.—Wills Act, s. 24—Contrary Intention—Bequest of Share of Rents and Profits to Son, whether for Life or a longer Period.] *J. O.*, who died in 1860, by will made in 1859 gave to trustees all his estates of which he should be seised or possessed at the time of his decease, upon trusts as to the residue of his personal estate to convert into money, pay debts (except such mortgage debt as should be charged on the leasehold estate at *C.* [occupied as a farm] bequeathed to his son), invest, and pay the income, and the rents of the estates to his wife for life or widowhood, she maintaining his children, provided that if his son should attain the age of twenty-one before he should become entitled in possession to the estate at *C.*, he should be paid by the trustees, as his share of the income, £40 annually from his majority to the death or marriage of his wife, and after either event they were to assign his leasehold property at *C.* (charged with the payment of mortgage debts charged thereon, and also with an annuity of £9 charged thereon) unto his son. The wife was to be allowed to occupy the farm at *C.* until her death or marriage, for the benefit of herself and children. *J. O.* was, at the date of his will, possessed of two leaseholds at *C.*, one charged with an annuity and the other with a mortgage debt, and he was the owner of real estate at *B.* In October, 1859, he purchased another leasehold adjoining his leaseholds at *C.*, and in November, 1859, he sold his estate at *B.* and received the purchase-money, but died suddenly before the completion of the purchase of the leasehold at *C.*—The son attained the age of twenty-one and died before his mother:—*Held*, that the legal personal representative of the son was entitled to be paid £40 a year until the death of the testator's widow or marriage; and that the after-acquired leasehold at *C.*, there being no contrary intention shewn, within the meaning of the *Wills Act* (1 Vict. c. 26), s. 24, formed part of the leaseholds at *C.* which the testator possessed at his death, and which he specifically bequeathed to the son. *In re* Ord, Deceased. Dickinson *v.* Dickinson - - - - - 667

13. —— *Revocation—Codicil—Confirmation.*] Where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed.—A testatrix by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised certain after-purchased property to the trustees of her will and confirmed her will:—*Held*, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone.—*Crosbie* v. *MacDowal* (4 Ves. 610) and *Burton* v. *Newbery* (1 Ch. D. 234) observed upon. Green *v.* Tribe - - - - - 231

—— Charitable legacy - - 337, 576
See Charity. 1, 2.

—— Gift of share of profits—Apportionment 159
See Apportionment.

—— Locke King's Act - - - 12
See Administration. 2.

WINDING-UP.
See Company.

WITNESS—Winding-up - - - 164
See Company. 7.

WOMAN PAST CHILD-BEARING—*Payment out of Court—Married Woman aged Fifty-four and Six Months.*] The Court refused to treat a woman as past child-bearing whose age was fifty-four and six months and had never had any children, but had only been married three years. Croxton *v.* May - - - - - - C. A. 388

WORDS—"Die seised" - - - 42
See Will. 5.

—— "Dividends or periodical payments" 159
See Apportionment.

—— "Heirs or next of kin" - - 607
See Will. 6.

—— "House, building, or manufactory" - 425
See Lands Clauses Act.

—— "Issue" - - - - - 131
See Will. 7.

—— "Not accountable for depreciation" - 95
See Will. 1.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

C. A. 1878 *In re* TUSSAUD'S ESTATE. TUSSAUD *v.* TUSSAUD. Judgment, C. A.

The Master of the Rolls decided that the legatees claiming under the will were bound to elect between the provision made for them by the will and that made by the settlement, on the ground that there was not sufficient to prevent the presumption that a father does not intend to make a double provision for a child from applying to the case. It is well established that there is such a presumption which, as stated by Lord *Cranworth* in *Lord Chichester* v. *Coventry* (1), "is in these cases founded on the assumption that in making the second instrument the maker of it supposes himself to be substantially satisfying the obligations of the first." But this presumption must yield to any sufficient indication of intention on the part of the maker of the instrument, if expressed on the face of that document, or if there is no expression of intention on the face of the instrument, it may, like any other presumption of law, be rebutted by extrinsic or parol evidence to shew what was the intention of the testator when he made his will. In the present case, Mr. *Davey* tendered parol evidence to rebut the presumption, and this, after argument, we held to be admissible. But after having heard the evidence, we are of opinion that it does not aid the case of the testator's daughter, Mrs. *White*, and her children.

The question therefore must be, is there sufficient on the face of the will to shew that the testator did not intend the provision thereby made to be in lieu of that made by the settlement, or, in other words, to satisfy his obligation under that instrument? In arriving at a conclusion on this question, we must, of course, look at the settlement, for the purpose of seeing what the obligations of the testator under that instrument and the provision thereby made for his daughter's family were. What we have to consider is well expressed by Lord *Colonsay* in the case of *Lord Chichester* v. *Coventry* (2), in these words: "But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other." It must be remembered that slight differences between the two provisions

(1) Law Rep. 2 H. L. 89. (2) Law Rep. 2 H. L. 98.

will not be sufficient to prevent the presumption from arising. Slight differences, however, in the words of Sir *John Leach*, in *Weall* v. *Rice* (1), are such "as, in the opinion of the Judge, leave the two provisions substantially of the same nature;" and he adds, "every Judge must decide that question for himself." What, then, are the differences in the present case between the two provisions? In the first place, under the settlement Mrs. *White*, with the consent of the trustees, had an absolute power to deal in any way she thought fit with the fund which the testator had thereby convenanted to settle. The will did not give Mrs. *White* any such power. Under the settlement Mr. *White* took, subject to the life estate of his wife, a life interest in the fund; and if no children attained a vested interest, he, unless his wife dealt with the fund under the power, became absolutely entitled thereto, while under the will no interest was given to him in the legacy thereby settled; and if there was no child of Mrs. *White* who attained a vested interest, the settled fund went to the testator's sons. These differences, in our opinion, cannot be considered as slight. They are substantial differences between the two provisions. However, if the legacy given by the will was intended to be a satisfaction of the testator's obligation under the settlement, it could only be so by putting the parties claiming under the will to their election; and the fact that one of the persons who took a substantial interest under the settlement takes no interest under the will is a strong reason for coming to the conclusion that the testator did not intend the gift by will to be in lieu of, or in satisfaction of, his liability under the former instrument. In our opinion it is erroneous to treat the difference between the persons interested under the two interests merely as creating a difficulty in carrying into effect the testator's intention. If the intention is expressed, it must be carried into effect so far as practicable, and difficulties in completely effecting the intention cannot alter the construction. But where the Court has to determine whether a presumption arises—that is, whether a particular intention ought to be assumed—the circumstance that the limitations of the will, as to which there is no doubt, are not consistent with effect being given to that intention which the Court is asked to presume, is a strong argument

(1) 2 Russ. & My. 268.